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A TREATISE
ON THE
LAW OF PARTNERSHIP.

Fifth Edition.

BY
THE RIGHT HONOURABLE
SIR NATHANIEL LINDLEY. KNT.,
ONE OF THE LORDS JUSTICES OF HER MAJESTY'S COURT OF APPEAL.

ASSISTED BY
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With American Notes

BY
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IN TWO VOLUMES.

Vol. I.

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EDITOR'S PREFACE.

THE conviction with which this work was undertaken, that the less it was edited the better, has been confirmed as the labor upon it progressed.

The original plan of simply collecting and citing the American cases has been changed by the alteration of the work by the Author in the fifth edition, reducing it from two volumes to one by the omission of the law pertaining to Companies and Corporations under English legislation. This change, occurring just before this edition was announced to appear, has rendered necessary a re-examination of the cases to meet the altered method of treatment.

No attempt is made to write a book upon the Law of Partnership already so thoroughly covered by Story and by Bates, but the plan is to give the full text of Lord Justice Lindley's last edition, with such additions of American authorities as will make it serviceable to the American student and practitioner in subordination to the masterly plan and treatment of the Author.

Nor is any attempt made to present the conclusions of the forty-five separate jurisdictions into which the American courts are divided, in the methodical manner of the Author, who deals only with a single jurisdiction, and speaks with the authority of a jurist and the learning of a special student.

A short chapter on Joint-Stock Companies is added to supply the elimination of that branch of the Law

of Partnership by the Author from the fifth edition, and to meet the expectations of the Profession on this important part of the subject.

My obligations to Mr. S. W. Hatheway, of the Boston Bar. for his assistance in preparing and correcting the notes and citations should be acknowledged in this connection.

Imperfectly, as I am impressed the task set for me has been done, it is satisfaction to have been able to help the American lawyer to obtain in this Series the *best* modern English text-book.

ALONZO B. WENTWORTH.

Boston, *May* 22, 1888.

AUTHOR'S PREFACE.

THE present volume is the Fifth Edition of a portion of the author's former "Treatise on the Law of Partnership, including its application to Companies." When that Treatise was first published, viz., in 1860, the Law of Companies was being developed by legislative enactment and judicial decision out of the Law of Partnership ; and it appeared to the author desirable to trace that development, and to endeavour in one treatise to investigate the Law of Partnership and to determine the extent to which its principles were applicable to Companies. But in the course of the last quarter of a century, Company Law has been developed to such an extent as to justify, if not to require, separate treatment ; and with a view to convenience and expense, advantage has been taken of the opportunity afforded by the demand of a Fifth Edition, to divide the former treatise into two parts, each of which shall be complete without the other, viz., the Law of Partnership proper, and the Law of Companies, in so far as it has any connection with the former. This volume is devoted to the first of these parts, viz., the Law of Partnership proper. The volume relating to Companies is in course of preparation and will be published shortly.

In arrangement, the order of treatment previously adopted has been retained with the exceptions, that the causes of dissolution, the right to retire, and the right to expel, have been transferred to the Chapter on

Dissolution in Book IV. This modification will, it is hoped, be considered an improvement.

Great pains have been taken to render this edition deserving of the favourable reception accorded to those which have preceded it. Several very important cases, and especially *Kendall v. Hamilton*, *Scarf v. Jardine*, and the *Yorkshire Banking Company v. Beatson*, have been decided since the publication of the last edition. There has also appeared the *Digest of the Law of Partnership* by Mr. Frederick Pollock, which is full of observations of the greatest value; and the third edition of which the author has constantly consulted. In the Appendix to it will be found the draft of a bill to consolidate and amend the Law of Partnership. It is much to be regretted that this branch of the law should not be put into shape and codified by legislative authority. Mr. Pollock's remarks on this subject in the Preface to the 3d and 4th editions of the *Digest* deserve the serious attention of the Legislature. But this is not the place to enlarge on the many advantages which would accrue to this country if its laws were gradually revised on the model of the Indian codes.

The whole of the present treatise has once more been carefully revised throughout; whatever is obsolete has been omitted, or if retained as being still useful, has been printed in small type. The author's increased experience has suggested additions and alterations; and many portions have been re-written and adapted to the most recent decisions.

Notwithstanding, however, the labour bestowed upon

the work, and the anxiety of the author to render it a trustworthy guide to the subject to which it relates, the multiplicity and difficulty of the questions with which he has had to deal are such, that he dare not venture to hope that he has always avoided error, or that his work is free from serious faults ; and although it has engaged his unremitting attention for more than thirty years, he is painfully aware that it is even now but an imperfect production.

The author's thanks are due to Mr. W. C. Gull and Mr. W. B. Lindley, for their assistance in revising the sheets, and to the former gentleman also for his aid in preparing materials, in examining American and Irish reports and authorities on doubtful points, and for the preparation of the indexes.

ROYAL COURTS OF JUSTICE,
1st March, 1888.

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THE LAW OF PARTNERSHIP.

INTRODUCTORY.

1. *Meaning of the word partnership.*

Partnerships.— To frame a definition of any legal term which shall be both positively and negatively accurate, is possible only to those who having legislative authority, can adapt the law to their own definition. Other persons have to take the law as they find it; and rarely indeed is it in their power to frame any definition to which exception may not justly be taken. All that they can usefully attempt is to analyse the meanings of the words they use, and to take care not to employ the same word in different senses, where so to do can possibly lead to confusion.

Without attempting, then, to define the terms partners and partnership, it will suffice to point out as accurately as possible the leading ideas involved in those words. The terms in question are evidently derived from *to part*, in the sense of to divide amongst, or share, and this at once limits their application, although not very precisely: for persons may share almost anything imaginable, and may do so either by agreement amongst themselves or otherwise. But in order that persons may be partners in the legal acceptance of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business engaged in for their common benefit. An agreement that something shall be attempted with a view to gain, and *that the gain shall be shared by the parties to the agreement, [*2]

is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term (*a*).

Partnership, although often called a contract, is in truth the result of a contract; the relation which subsists between persons who have agreed to share the profits of some business rather than the agreement to share such profits.

By some writers associations which have not gain for their object are occasionally termed partnerships; and even in the Companies act, 1862, partnerships having gain for their object are referred to, and the reader is thereby led to suppose that there may be partnerships of some other kind (*b*). But to use the word partnership to denote a society not formed for gain is to destroy the value of the word, and can lead only to confusion (*c*). Nor is it consistent with modern usage. Lord Hale and older writers use co-partnership in the sense of co-ownership, but this is no longer customary; and as will be shown hereafter, there are many important differences between the two (*d*).

Although for the reasons already stated the writer has not attempted to give a definition of the term partnership, he appends for the consideration of the reader the following definitions taken from works of celebrity:—

Civil Code of New York.—Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them (*e*).

Code civil.—La société est un contrat, par lequel deux ou plusieurs personnes conviennent de mettre quelque chose en commun, dans la vue de partager le bénéfice qui pourra en résulter (*f*).

Dixon.—A partnership is a voluntary unincorporated association of individuals standing to one another in the relation of principals for carrying out a joint operation or undertaking for the purpose of joint profit (*g*).

Domat.—La société est une convention entre deux ou plusieurs personnes, par laquelle ils mettent en commun entre eux ou tous leurs biens ou une partie, ou quelque commerce, quelque ouvrage, ou quelque [*3] autre affaire, pour *partager tous ce qu'ils pourront avoir de gain ou souffrir de perte de ce qu'ils auront mis en société (*h*).

Kent.—Partnership is a contract of two or more competent persons to

(*a*) *Molliwo, March & Co. v. Court of Wards*, L. R. 4 P. C. 436; *R. v. Robson*, 16 Q. B. D. 137.

(*b*) See sec. 4 of the act.

(*c*) See as to clubs, *infra*, chap. 1, § 5.

(*d*) See *infra*, chap. 1, § 6.

(*e*) Civil Code of the State of New York, § 1283.

(*f*) Code Civil, § 1832.

(*g*) Dixon's Law of Partnership, 1.

(*h*) Domat, les Lois Civiles, liv. i. tit. 8, § 1.

place their money, effects, labour, and skill, or some or all of them, in lawful commerce, or business, and to divide the profit and bear the loss in certain proportions (*i*).

Indian Contract act.—Partnership is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them (*k*).

Parsons.—Partnership is the combination by two or more persons of capital, or labour, or skill, for the purpose of business for their common benefit (*l*).

Pollock.—Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them (*m*).

Pothier (1).—Le contrat de société est un contrat par lequel deux ou plusieurs personnes mettent, ou s'obligent de mettre, en commun quelque chose, pour faire en commun un profit honnête, dont ils s'obligent réciproquement de se rendre compte (*n*).

Pothier (2).—Societas est contractus de conferendis bona fide rebus aut operis, animo lucri quod honestum sit ac licitum in commune faciendi (*o*).

Prussian code.—Ein Vertrag durch welchen mehrere Personen ihr Vermögen oder Gewerbe oder auch ihr Arbeiten und Bemühungen ganz oder zum Theil zur Erlangung eines gemeinschaftlichen Endzwecks vereinigen, wird ein Gesellschaftsvertrag genannt (*p*).

Pufendorf.—Le contrat de société se fait lorsque deux ou plusieurs personnes mettent en commun leur argent, leurs biens, ou leur travail, à la charge de partager entr'eux le gain et de supporter les pertes qui en arriveront, chacun à proportion de ce qu'il contribue du sien (*q*).

Rutherford.—When two or more persons join money, or goods, or labour, or all of these together, and agree to give each other a common claim upon such joint stock, this is partnership (*r*).

Story.—Partnership, often called co-partnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labour, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them (*s*).

Thibaut.—Verbinden sich mehrere zur Erreichung eines ihnen gemeinschaftlichen *Endzwecks so wird diesz ein Gesellschaftsvertrag (*societas*, Mascopei, Magenschaft) genannt. Ge- [*4]

(*i*) 3 Kent's Comm. 23.

(*k*) Indian Contract act, § 239.

(*l*) Parson's Part. chap. 2, § 1. This definition is inaccurate. The word denotes a combination of persons, not a combination of capital.

(*m*) Pollock's Digest of the law of Partnership, § 4, ed. 3.

(*n*) Pothier, Traité du Contrat de Société, § 1. There is a useful English edition of this work by O. D. Tudor, Esq.

(*o*) Pothier, Pand. lib. xvii. tit. 2, § 1, art. 1.

(*p*) Allgem. Landsrecht für die Preuss. Staat. th. i. tit. 3, § 169.

(*q*) Pufendorf, Le Droit de la Nat. et des Gens, éd. Barbeyrac, liv. v. chap. 8, § 1.

(*r*) Inst. of Nat. Law, bk. i. c. 13, § 9.

(*s*) Story on Partn. § 2.

schiebt diese Verbindung zu eigennützigen Zwecken so nennt man sie *societas quæstuarial*, oder *negotiatoria*, sonst aber *non quæstuarial* (*t*).

Vinnius. — *Societas est contractus, quo inter aliquos res aut operæ communicantur, lucri in commune faciendi gratia* (*u*).

Voet. — *Societas est contractus jurisgentium, bonæ fidei, consensu constans, semper re honesta, de lucri et damni communione* (*x*).

Watson. — Partnership is a voluntary contract between two or more persons for joining together their money, goods, labour, and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionably between them, and having for its object the advancement and protection of fair and open trade (*y*).

All the above definitions, however, with the exception of Mr. Dixon's, are, with reference to the law of England, too wide; for they include not only partnerships in the proper sense of the word, but also many corporations and companies which differ from partnerships in several important respects, and which it is better therefore not to denote by the same word. Mr. Dixon's definition avoids this error, but the relation of principles to which he refers is not altogether free from objection (*z*).

If partnership is defined so widely as to include incorporated and other companies, partnerships must be subdivided into (1) ordinary and (2) extraordinary partnerships as in the Indian Contract act (*a*). But it is more in accordance with ordinary usage to confine the word to unincorporated societies not governed by any special statute or custom.

2. *Distinction between partnerships, corporations, and companies.*

Corporations. — A corporation is a fictitious person, created by special authority (by the law of England by the [*5] Crown or by *parliament), and endowed by that authority with a capacity to acquire rights and incur obligations, as a means to the end for the attainment of which the corporation is created. A corporation, it is true, consists

(*t*) Thibaut, *System des Pandekten Rechts*, § 467, edition 9. This division of partnerships into partnerships having gain for their object, and other partnerships, is noticed by most German writers on the civil law.

(*u*) Vinn. Inst. iii. 26.

(*x*) Voet, *Comm. ad Pand. lib. xvii. tit. 2, Pro Socio*, § 1.

(*y*) Watson, *Partn.* p. 1. This definition is copied by Gow in his work on partnership.

(*z*) See the observations of the Master of the Rolls on the above definitions in *Pooley v. Driver*, 5 Ch. D. 471 *et seq.*

(*a*) See § 266.

of a number of individuals, but the rights and obligations of these individuals are not the rights and obligations of the fictitious person composed of those individuals; nor are the rights and obligations of the body corporate exerciseable by or enforceable against the individual members thereof, either jointly or separately, but only collectively, as one fictitious whole. As the civilians neatly express it—*Si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent*.

With partnerships the case is otherwise; the members of these do not form a collective whole, distinct from the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by and against them individually: *Si quid societati debetur singulis debetur et quod debet societas singuli debent* (b).

Companies. 1. **Unincorporated.**—The fundamental distinction between partnerships and unincorporated companies is, that a partnership consists of a few individuals known to each other, bound together by ties of friendship and mutual confidence, and who, therefore, are not at liberty without the consent of all to retire from the firm and substitute other persons in their places; whilst a company consists of a large number of individuals not necessarily nor indeed usually acquainted with each other at all, so that it is a matter of comparative indifference whether changes amongst them are effected or not (c). Nearly all the differences which exist between ordinary partnerships and unincorporated companies, will be found traceable to the above distinction. Indeed it may be said that the law of unincorporated companies is composed of little else than the law of partnership modified and adapted to the wants of a large and fluctuating number of members.

2. **Incorporated companies.**—Incorporated companies are societies consisting usually of *many persons, having transferable shares in a common fund, but [*6] incorporated by Royal Charter or by Act of Parliament.

(b) See *Lloyd v. Loaring*, 6 Ves. 773; *Beaumont v. Meredith*, 3 V. & B. 180; *Ryhope Coal Co. v. Foyer*, 7 Q. B. D. 498.

(c) See *per James, L. J.*, in *Smith v. Anderson*, 15 Ch. D. 273.

They are not pure partnerships, for their members are recognised as an aggregate body; nor are they pure corporations, for their members are more or less liable to contribute to the debts of the collective whole. Incorporated companies are intermediate between corporations known to the common law and ordinary partnerships, and partake of the nature of both; and the law relating to these companies depends as well on the principles which govern ordinary partnerships, as on those which are applicable to corporations strictly so called (*d*).

The present volume is confined to Partnerships in the ordinary sense. Incorporated companies and companies which, although unincorporated, consist of numerous members and are governed by special statutes or by special customs, *e.g.*, Cost Book Mining Companies, will be dealt with in another volume.

(*d*) See the judgments in 5 Ch. 431 and 732. As to when corporations are persons within the meaning of acts of Parliament, see *The Phar-*

maceutical Soc. v. The London and Provincial Supply Assoc., 5 Q. B. D. 310, aff. 5 App. Ca. 857.

OF CONTRACTS OF PARTNERSHIP.

CHAPTER I.

THE NATURE OF THE CONTRACT DETERMINED.

PRELIMINARY OBSERVATIONS.

Agreement to share profits the essence of a partnership. — The basis of all partnerships is an agreement to share the profits arising from some business or undertaking. Usually, but not necessarily, partners have a joint capital or stock, by the employment of which the profits to be shared are expected to arise; and in ordinary partnerships, but not in companies, each partner usually takes an active part in the prosecution of the partnership business. Nothing, perhaps, can be said to be absolutely essential to the existence of a partnership except a community of interest in profits resulting from an agreement to share them. But, although this is so, the usual characteristics of an ordinary partnership are a community of interest in profits and losses, a community of interest in the capital to be employed, and a community of power in the management of the business engaged in.

Profits and losses. — Profits (or net profits) are the excess of returns over advances; the excess of what is obtained over the cost of obtaining it. Losses, on the other hand, are the excess of advances over returns; the excess of the cost of obtaining over what is obtained.

Gross profits. Net profits. — Profits and net profits are for all legal purposes synonymous expressions; but the returns themselves are often called gross profits; hence it becomes necessary to call profits net profits in order to avoid con-

[*8] fusion. In the *present treatise, however, the word profits will be used in the sense of net profits; and the expression gross profits will be avoided as much as possible.

Persons who share both advances and returns, and also persons who share the difference between them, whatever that difference may be, necessarily share both profits and losses; profits, if the returns exceed the advances; losses, if the advances exceed the returns. But persons who share profits, *i.e.*, the excess of returns over advances, do not necessarily share losses; for profits may be shared by those who make no advances; and persons may stipulate for a division of gain, if any, and yet some one or more of them may by agreement be entitled to be indemnified against losses by the others; so that whilst all share profits, some only bear losses.

Sharing gross returns.—The actual or gross returns obtained by advances obviously include profits if profits have been made. But those returns do not include losses, if losses are incurred; for losses are the excess of the advances over the returns, and come out of the advances, and not out of the returns. Hence persons who share gross returns necessarily share profits, but they do not *by sharing the returns* share losses, for these fall entirely on those making the advances. Moreover, although a division of gross returns is a division of profits, if there are any, it is so only incidentally, and because such profits are included in what is divided; it is not a division of profits as such; and under an agreement for a division of gross returns, whatever is returned must be divided, whether there be profit or not.

On the other hand, if the persons sharing gross returns also share the advances by means of which the returns are made, there is necessarily community both of profit and of loss; community of profit if the returns exceed the advances; community of loss if the advances exceed the returns.

Distinction between sharing profits and gross returns.—The above remarks have appeared necessary in order to explain the reasons for the distinction made by English lawyers between agreements to share profits (*i.e.*, net profits and profits as such) on the one hand, and agreements to share gross returns (sometimes called gross profits) on the other: and in order to account for the rule that whilst an agree-

ment to share profits creates a partnership, an agreement to share gross *returns does not. The reason- [*9]ableness, however, of the above distinction is very questionable, at least where there is any community of capital or common stock; and the rule itself is probably attributable less to the difference which exists between net profits and gross returns than to the doctrine which so long confused the whole law of partnership in this country, and according to which all persons who shared profits incurred liability as if they were really partners. When this doctrine was rife, the distinction between sharing net profits and gross profits (*i.e.*, returns) had considerable practical value; but, as will be seen hereafter, the doctrine in question is now wholly exploded, and the distinction alluded to is of little importance.

Quasi-partnerships.—The doctrine to which reference has been made renders it necessary to caution the reader against an ambiguity in the word partnership as used by English lawyers. Partnerships are by them divided into partnerships (properly so called), and partnerships as regards third persons, which are not in fact partnerships at all, and should never be so styled. What is called a partnership as regards third persons (*quasi*-partnership), is nothing more than a number of persons, who, in consequence of certain acts done by them, are held liable for each other's conduct, as if they had entered into a contract of partnership amongst themselves. What these acts are will be considered hereafter: but the reader is requested to bear in mind that for the present, partnerships properly so called, and not *quasi*-partnerships, are intended to be spoken of.

Having made these preliminary observations, it is proposed to consider what agreements do, and what do not, result in a partnership in the proper sense of the word.

* SECTION I.—OF TRUE PARTNERSHIPS. [*10]

1. — *Partnership is the result of an agreement to share profits and losses.*

Agreements to share profits and losses.—Whether an agreement creates a partnership or not depends on the real inten-

tion of the parties to it (a).¹ If the agreement is not in writing the intention of the parties must be ascertained from their words and conduct. If the agreement is in writing, its true construction must be determined; but, as will be more

(a) *Mollwo, March, & Co. v. Court* Hirsch, 27 Ch. D. 460; *Ross v. Par-*
of Wards, L. R. 4 P. C. 419; *Pooley* kins, 20 Eq. 331, and other cases
v. Driver, 5 Ch. D. 460; *Walker v.* cited *infra*, p. 13, note (r).

¹ In *Ryder v. Wilcox*, 103 Mass. 24, the court sustained a demurrer to an action for damages for breach of a contract by which plaintiff was to have half the net profits of the business in payment of his services as superintendent and manager of the business, and held that it was the intent of the parties to become partners, and this intent was to be gathered from the contract.

To this rule, that the intention of the parties controls in the determination of the question see *Story* on Part. 49; *Bates* on Part. 17.

Where two persons bought a horse, which they intended to sell at a profit, and by agreement the owner having the possession of the horse should provide for his keeping, but neither should sell without the concurrence of the other, they were held to be tenants in common and not partners. *Goell v. Morse*, 126 Mass. 480.

Where the purpose of the parties is that no partnership shall exist, persons cannot be made to assume that relation. *London Assurance Co. v. Drennen*, 116 U. S. 461; *Burnett v. Snyder*, 81 N. Y. 550. See *Adams Bank v. Rice*, 2 Allen, 480.

In *Thayer v. Augustine*, 55 Mich. 188, the plaintiff rented a saloon to defendant, agreeing to take as rent therefor one-half of the profits of the business. Plaintiff maintained assumpsit for rent, the court saying that the agreement did not constitute the parties partners, and that their intention should prevail.

In *Farnum v. Patch*, 60 N. H. 294, an association called the "Oak Hill Grange" by written agreement established a country store, taking "shares" at \$25 each. Upon bill in equity for contribution as between partners it was held that the members were partners, and that their belief or understanding that they were not partners was a mistaken and immaterial view of the law.

Where a mail contractor agreed with a sub-contractor that he should have one-half the compensation for one-half the service, it was held that there was no partnership. *Wilkinson v. Jett*, 7 Leigh. 115. And by an agreement to divide the gross earnings of a boat, which was to be furnished by one party and sailed by the other, no partnership is constituted. *Bowman v. Bailey*, 10 Vt. 170.

A joint interest in a patent does not constitute the owners partners. *Parkhurst v. Kinsman*, 1 Blatchf. 488.

In *Iliff v. Brazill*, 27 Iowa, 131, two farmers bought a threshing-machine, giving therefor a note signed by both of them, the machine to be used in common, and it was held that they were joint owners and not partners.

Voluntary consent to the relation and obligation of partnership is necessary. *Hedge's Appeal*, 63 Pa. St. 273.

The lender of capital to be put at risk in business is not thereby a partner. *Adams v. Funk*, 53 Ill. 219; *Owens v. Mackall*, 33 Md. 382; *Manhattan Co. v. Sears*, 1 Sweeney, 426; *Buck v. Dowley*, 16 Gray, 555; *Pleasants v. Fant*, 22 Wall. 116.

Where a laborer agreed with a land-owner to cultivate his land for a fixed time and receive half the crop, no partnership was created. *Holloway v. Brinkley*, 42 Ga. 226; *Donnell v. Harshe*, 67 Mo. 170.

fully shown in a subsequent chapter, even a written contract may be departed from and modified by a new verbal agreement between all the partners proved by conduct inconsistent with the written document (*b*).

But an agreement to share profits and losses, may be said to be the type of a partnership contract. Whatever difference of opinion there may be as to other matters, persons engaged in any trade, business, or adventure upon the terms of sharing the profits *and* losses arising therefrom, are necessarily to some extent partners in that trade, business, or adventure; nor is the writer aware of any case in which persons who have agreed to share profits and losses have been held not to be partners(*c*). But it does not follow that each of several persons who share profits and losses has all the rights which partners usually have. For example, a person may share profits and losses and yet have no right actively to interfere with the management of the business (*d*); or he may have no such right to dissolve as an ordinary partner has (*e*); or he may have no right *to [*11] share the goodwill of the business on a dissolution; and other instances of restricted rights may be suggested. What in any given case the rights of a particular partner are depends on the agreement into which he has entered; but unless the word partner is to be deprived of all definite meaning its proper application to persons who share profits and losses can hardly be questioned (*f*).

Accordingly, in *Green v. Beesley* (*g*), a partnership was

(*b*) *Infra*, Book III. c. 9.

(*c*) In *Mair v. Glennie*, 4 M. & S. 240, the expression profit or loss seems to have been used for gross returns. And in *Geddes v. Wallace*, 2 Bligh, 270, the arrangement as to profit and loss did not apply to the person as to whom the question of partnership or no partnership was raised.

(*d*) As in *Walker v. Hirsch*, 27 Ch. D. 460.

(*e*) See as to this *Moore v. Davis*, 11 Ch. D. 261; *Pawsey v. Armstrong*, 18 Ch. D. 698, in both of which the right to dissolve was held to exist. But *qu.* whether *Pawsey v. Armstrong* did not go too far.

(*f*) See however the judgment of Cotton, L. J., in *Walker v. Hirsch*, 27 Ch. D. 460.

(*g*) 2 Bing. N. C. 108.

Compensation of an employee measured by a portion of the profits does not make him a partner. *Miller v. Chandler*, 29 La. Ann. 88; *Chaffraix v. Price*, Id. 176; *Bell v. Hare*, 12 Heisk. 615.

But where persons without a legal organization undertake to act as a corporation they become liable as partners to those with whom they deal, even if their intention and the belief of persons dealing with them is that they constitute a corporation. *Jessop v. Carnegie*, 44 N. Y. Sup. Ct. 260; see *Marseilles Co. v. Aldrich*, 86 Ill. 504.

held to result from an agreement that the plaintiff should horse a mail cart and be paid by the defendant 9*l.* per mile per annum for so doing, and that the plaintiff and the defendant should share the expenses of repairing and replacing the carts and the moneys received for the conveyance of parcels and the losses occasioned by their loss or damage.

So in *Brett v. Beckwith (h)*, a partnership was held to exist between underwriters, one of whom had agreed to take a joint share of the underwriting risks of the other, paying or receiving sums according to the result of the accounts.

These authorities are sufficient to show that an agreement to share profit and loss, is an agreement for a partnership, although the words partners or partnership do not occur in the agreement (*i*).

Partnership not intended. — Cases which present most difficulty are those in which persons agree to share profits and losses and at the same time declare they are not to be partners.¹ The question then arises, what do they really mean? If they have in fact stipulated for all the rights of partners, an agreement that they shall not be partners is a useless protest against the consequences of their real agreement (*k*). But a clause negating a partnership may throw light on other clauses, and rebut inferences which might be drawn from them alone. In practical life such questions do not arise in any abstract form. Some definite dispute has [*12] to be determined, *e.g.*, liability to creditors *or the right of one party to the agreement to some particular thing or to some particular relief as to which the agreement itself is the true guide.

2. — *Partnership is primâ facie the result of an agreement to share profits, although nothing may be said about losses, and although there may be no common stock.*

Agreements to share profits only. — Except in cases specially provided for by statute, an agreement to share profits,

(h) 3 Jur. N. S. 31, in the Rolls.

(i) See, too, *Greenham v. Gray*, 4 Ir. Com. L. Rep. 501.

(k) See *Ex parte Delhasse*, 7 Ch.

D. 511; *Moore v. Davis*, 11 Ch. D. 261. See also *Pooley v. Driver*, 5 Ch. D. 460.

¹ Postponement of division of profits does not alter the character of the agreement. *Beauregard v. Case*, 1 Otto, 134, 23 L. ed. 263; *Beckwith v. Talbot*, 95 U. S. 289, 24 L. ed. 496.

nothing being said about losses, amounts *primâ facie* to an agreement to share losses also (*l*¹;) for it is but fair that the chance of gain and of loss should be taken by the same persons; and it is natural to suppose that such was their intention if they have said nothing to the contrary (*m*). It follows from this, that where no statute interferes, an agreement to share profits is *primâ facie* an agreement for a partnership; and accordingly it has been held, that unless an intention to the contrary can be shown, persons engaged in any business or adventure and sharing the profits derived from it, are partners as regards that business or adventure (*n*). See L. 25, n. 2.

Community of profit as a test of partnership.—Indeed, it has often been said, that community of profit is the test of partnership (*o*).² This, however, is not accurate. Whether persons are really partners or not is a question of intention, to be decided by a consideration of the whole agreement into which they have entered, and ought not to be made to turn on one or two only of the clauses in it (*p*). A good instance of this is afforded by the Irish case of *Barklie v. Scott* (*q*).

(*l*) *Greenham v. Gray*, 4 Ir. Com. Law Rep. 501; *Dry v. Boswell*, 1 Camp. 330; *Heyhoe v. Burge*, 9 C. B. 440, *per Parke*, B.

(*m*) This *primâ facie* inference was held to be excluded by the rules of the building societies which were considered in *Brownlie v. Russell*, 8 App. Ca. 235 and *Tosh v. North British Build. Soc.*, 11 App. Ca. 489.

(*n*) See *Pooley v. Driver*, 5 Ch. D. 458.

(*o*) *Heyhoe v. Burge*, 9 C. B. 446; *Fox v. Clifton*, 9 Bing. 115; *Ex parte Langdale*, 18 Ves. 300.

(*p*) See *ante*, p. 10 and the cases in the next note but one.

(*q*) 1 Huds. & Br. 83. Compare *Reid's case*, 24 Beav. 318, where the father who had transferred shares into his infant son's name was held a contributory.

¹ *Cothran v. Marmaduke*, 60 Tex. 372; *Chester v. Dickinson*, 54 N. Y. 1; *Goode v. McCartney*, 10 Tex. 195; *Manhattan Brass Co. v. Sears*, 45 N. Y. 797; *Sheridan v. Medora*, 10 N. J. Eq. 469; *Lengle v. Smith*, 48 Mo. 276; Coll. Part. § 31; *Bates*, Part. § 30; *In re Ward*, 8 Reporter, 136; *Pinkerton q.t. v. Ross*, 33 Ont. Q. B. 508; *Botham v. Keefer*, 2 Ont. App. 595; *Sylvester v. McCuaig*, 28 Ont. C. P. 443; *Bank of Rochester v. Stonehouse*, 27 Ont. Ch. 327; *Harvey v. Childs*, 28 Ohio St. 319; *Shaw v. Galt*, 1 I. R. 16 C. L. 375 (O'Brien, J.).

² The way in which the profits are to be shared is the essence of the matter, and when the right to profits arises by virtue of an express contract and does not flow from the relations of the parties, the right exists *quâ* debt, and not by virtue of a partnership. *Merchants' Bank v. Thompson and Mallon v. Craig*, 3 Ont. R. Ch. D. 541; *Neil v. Park*, 10 Ont. P. R. 476 (Boyd); *Darling v. McClelland & al.*, 2 Russell and Chesley, 164 (N. S.); *Re Randolph*, 1 Ont. App. 315; *The Crusader*, 1 Ware, 448; *Pleasants v. Fant*, 22 Wall. 116; *Loomis v. Marshall*, 12 Conn. 69; *Drake v. Ranney*, 3 Rich. 37; *Brown v. Jaquette*, 94 Pa. St. 113; s. c. 39 Am. Rep. 770.

There a father paid a sum of money as his infant son's share of the capital of a partnership, and it was agreed [*13] *that during the son's minority the profits should be accounted for to the father; it was held that the father was not himself a partner, that clearly not being the intention of the parties to the agreement.

Servants, &c., sharing profits.—Other illustrations of the same principle are afforded by those cases in which managers and clerks are paid salaries proportionate to the profits of the business in which they are employed. The act, 28 & 29 Vict. c. 86, which will be noticed hereafter, expressly provides for such cases as these; but independently of that act no partnership subsists between persons thus paid and those who pay them, where it appears from the whole agreement that a partnership was not intended (r).¹ The observations

(r) *Ex parte* Tennant, 6 Ch. D. 303, where a father claimed to be a partner with his son; *Ross v. Parryns*, 20 Eq. 331; *Rawlinson v. Clarke*, 15 M. & W. 292; *Stocker v. Brocklebank*, 3 Me. & G. 250; *Shaw v. Galt*, 16 Ir. C. L. 397; *Radeliffe v. Rushworth*, 33 Beav. 484, where there was a holding out and a deed executed by the alleged partners, in which they were described as carry-

ing on business together. See also, *Geddes v. Wallace*, 2 Bligh, 270. In *R. v. Macdonald*, 7 Jur. N. S. 1127, a servant, paid by a share of profits, was convicted of embezzlement, which he could not then have been if he had been a partner. In *Withington v. Herring*, 3 Moo. & P. 30, an agent paid by a salary and a share in the profits was thought to be a partner, but the question was not decided.

¹ Paying a salesman or other employee a percentage or share of profits does not make him a partner. *Vinson v. Beveridge*, 3 MacArthur, 597; s. c. 36 Am. Rep. 113; *Sodiker v. Applegate*, 24 W. Va. 411; s. c. 49 Am. Rep. 252; *Benson v. Ketchum*, 14 Md. 331; *Boardman v. Keeler*, 2 Vt. 67; *Kerr v. Potter*, 6 Gill. 404; *Muzzey v. Whitney*, 10 Johns. 225; *Holden v. French*, 68 Me. 241; *Coffin v. Jenkins*, 3 Story, 108; *Baxter v. Rodman*, 3 Pick. 435; *Christian v. Crocker*, 25 Ark. 325; *Randle v. State*, 49 Ala. 14; *Parker v. Canfield*, 37 Conn. 250; *Commonwealth v. Bennett*, 118 Mass. 443; *Burton v. Goodspeed*, 69 Ill. 237; *Meserve v. Andrews*, 104 Mass. 360; *Norment v. Hull*, 1 Humph. 320; *Voorhees v. Jones*, 29 N. J. L. 270; *Bradley v. White*, 10 Met. 303; *Blanchard v. Coolidge*, 22 Pick. 151; *Smith v. Bodine*, 74 N. Y. 30; *Smith v. Perry*, 29 N. J. L. 74; *Bull v. Schubert*, 2 Md. 38; *Taylor v. Sotolingo*, 6 La. Ann. 154; *Reed v. Murphy*, 2 G. Greene, 574; *Mason v. Hackett*, 4 Nev. 420; *Atherton v. Tilton*, 44 N. H. 452; *Nutting v. Colt*, 7 N. J. Eq. 539; *Barekle v. Eckhart*, 1 Den. 338; s. c. 3 N. Y. 132; *Merwin v. Playford*, 3 Robt. (N. Y.), 702; *Shropshire v. Sheperd*, 3 Ala. 733; *Hanna v. Flint*, 14 Cal. 73; *Hodges v. Dawes*, 6 Ala. 215; *Miller v. Chandler*, 29 La. Ann. 88; *Chaffraix v. Priece*, 29 La. Ann. 176; *Bell v. Hare*, 12 Heisk. 615; *Butler v. Finck*, 10 N. Y. Weekly Dig. 163; *Shepard v. Pratt*, 16 Kan. 209; *Hodgman v. Smith*, 13 Barb. 302; *Dunham v. Rogers*, 1 Pa. St. 255; *Brockway v. Burnap*, 16 Barb. 209; *Goode v. McCartney*, 10 Tex. 193; *Amble v. Bradley*, 6 Vt. 119; *Loomis v. Marshall*, 12 Conn. 69; *Webb v. Leggett*, 6 Mo. App. 345; *Clark v. Gilbert*, 32 Barb. 576; *Hall v. Edson*, 40 Mich. 651; *Price v. Alexander*, 2 G. Greene,

on agreements to share profits and losses (*ante*, p. 10) are applicable to agreements to share profits only; but with this difference, viz., that in the latter case it is easier than in the former to come to the conclusion that a partnership was not intended to be formed.

If the servant sharing profits has also an interest in the

427; *Whitehall v. Shickle*, 43 Mo. 538; *In re Blumenthal*, 18 Bk. Reg. 555; *Bidwell v. Madison*, 10 Minn. 13; *Braley v. Goddard*, 49 Me. 115; *Hitchings v. Ellis*, 12 Gray, 449; *Denny v. Cabot*, 6 Met. 82; *Fawcett v. Osborn*, 32 Ill. 411; *Ruddich v. Otis*, 33 Iowa, 402; *Berthold v. Goldsmith*, 24 How. 542; *Bowyer v. Anderson*, 2 Leigh. 550; *Chapline v. Conant*, 3 W. Va. 507; *Dils v. Bridge*, 23 W. Va. 20; *Morgan v. Stearnes*, 41 Vt. 397; *Hamper's Appeal*, 51 Mich. 71; *Pond v. Cummins*, 50 Conn. 372; *Rushing v. People*, 42 Ark. 390; *Pleasants v. Fant*, 22 Wall. 116; *Sangston v. Hack*, 52 Md. 173; *Bull v. Schuberth*, 2 Md. 56; *Crawford v. Austin*, 34 Md. 49; *Miller v. Smith*, 10 L. C. R. 305 Q. B.

No partnership unless community of interest. *Beckwith v. Talbot*, 95 U. S. 289; 24 L. ed. 496; *Ward v. Thompson*, 22 How. 330.

Taking a share of the profits for rent or use of property does not make the owner a partner. *Donnell v. Harshe*, 67 Mo. 170; *Thayer v. Augustine*, 55 Mich. 187; s. c. 54 Am. Rep. 361; *Hayden v. Crawford*, 3 Ont. K. and Q. B. R. (O. S.) 583; *England v. England*, 57 Tenn. 108; *Perrine v. Hanksinson*, 11 N. J. L. 131; *Putnam v. Wise*, 1 Hill, 234; *McDonnell v. Battle House Co.*, 67 Ala. 90; s. c. 42 Am. Rep. 99; *Beecher v. Bush*, 45 Mich. 188; s. c. 40 Am. Rep. 465; *Brown v. Jaquette*, 94 Pa. St. 113; *Christian v. Crocker*, 25 Ark. 327; *Holmes v. Old Col. R. R.*, 5 Gray, 58; *Dwinell v. Stone*, 30 Me. 384; *Jeter v. Penn.* 28 La. Ann. 230; s. c. 26 Am. Rep. 98.

Association of carriers to form a continuous line for transportation of freight and a proportionate division of profits does not constitute them partners. *Hotsprings Railroad Co. v. Trippe*, 42 Ark. 465; s. c. 48 Am. Rep. 65; *Nashua Lock Co. v. W. & N. R. R. Co.*, 48 N. H. 339; s. c. 2 Am. Rep. 242; *Irwin v. Nashville & c. R. R.*, 92 Ill. 103; s. c. 34 Am. Rep. 116; *Gt. Western Ry. Co. v. Preston & B. Ry. Co.*, 17 Ont. Q. B. 477; *McCallum v. Buffalo & Lake Huron Ry. Co.*, 19 Ont. C. P. 117.

There must be the intention. *Salter v. Ham*, 31 N. Y. 321; *Hazard v. Hazard*, 1 Story, 371; *Drake v. Ramey*, 3 Rich. 37.

Or rather—as against creditors—there must not be an intention inconsistent with and excluding the partnership relation. *Owens v. Mackall*, 33 Md. 282; *Parker v. Canfield*, 37 Conn. 250; *Eastman v. Clark*, 53 N. H. 276; *Leggett v. Hyde*, 58 N. Y. 272; *Clafin v. Hirsch*, N. Y. S. C., (March, 1884).

The interest of each in the profits must be as a principal in the joint business with a community of interest in the profits as such. Where one purchased one-fourth of the net profits of a partnership to be ascertained, that did not make him a partner. *Parchen v. Anderson*, 5 Montana, 438; s. c. 51 Am. Rep. 65.

The principle upon which sharing net profits has been held to constitute a partnership as to third persons, as stated in Story on Part. § 58, is “because by taking a part of the profits he takes from the creditors a part of that fund which is security for the payment of their debts.” See Coll. Part. § 31; Bates, Part. § 30.

But in point of fact losses are no more payable out of profits than out of capital. *Boston and Colorado Smelting Co. v. Smith*, 13 R. I. 27; s. c. 43 Am. Rep. 2.

partnership capital or stock, this additional circumstance goes far to show that a partnership was, in fact, intended (*s*).

Partnerships in profits only.—It is not, however, essential to the existence of a partnership, that there shall be any joint capital or stock. If several persons labour together for the sake of gain, and of dividing that gain, they will not be partners the less on account of their labouring with their own tools. Thus in *Fromont v. Coupland* (*t*), two persons [*14] who horsed a coach and divided the profits *were held to be partners, although each found his own horses, and the other had no property in them.

So, in *French v. Styring* (*u*), where two co-owners of a race-horse agreed to share its winnings and the expenses of its keep, although there was some doubt as to whether they were partners or not, the Court had no hesitation in admitting that they might have been partners in the profits although not in the horse itself (*x*).

The ordinary agreement between publishers and authors, to the effect that the author shall contribute the manuscript, and the publisher shall, in the first instance, defray the expenses of publication, and repay himself out of the proceeds of the sale of the work, and that then the profits shall be divided, furnishes another instance of a partnership confined to profits only (*y*).

Again, it frequently happens that one person has property and another skill, and that they agree that the latter shall have the control of the property for the benefit of both, and that the profits shall be divided. In such cases it may be difficult to say whether a partnership is or is not created.¹

(*s*) See *Reid v. Holinshead*, 4 B. & C. 867; *Ex parte Chuck*, 8 Bing. 469; *Gilpin v. Enderby*, 5 B. & A. 954.

(*t*) 2 Bing. 170. See, too, *Lovegrove v. Nelson*, 3 M. & K. 1.

(*u*) 2 C. B. N. S. 357; noticed again *infra*, p. 18.

(*x*) See also *Steel v. Lester*, 3 C. P. D. 126. The dictum in *Syers v. Syers*, 1 App. Ca. 181, to the effect that a partnership in profits is a partnership in the assets by which they

are made is by no means universally true. See *infra*, note (*b*).

(*y*) See *Gardiner v. Childs*, 8 C. & P. 345; *Reade v. Bentley*, 3 K. & J. 271, and 4 ib. 656; *Wilson v. Whitehead*, 10 M. & W. 503; *Gale v. Leckie*, 2 Stark. 107; *Venables v. Wood*, 3 Ross L. C. on Com. Law, 529. This last case is an authority for the proposition that authors and publishers are not partners at all, and *qu.* whether this is not the correct doctrine.

¹ Where one person furnished a farm with the outfit and funds to carry it on, and another furnished the labor and management under an agreement to repay one-half the advances and expenses of feeding the stock, and to divide

In *Stocker v. Brocklebank* (z), it is clear that no partnership was intended and none was created; in the Irish case of *Greenham v. Gray* (a), it was thought that the whole agreement could only receive a reasonable construction by holding a partnership to exist, and a partnership was held to exist accordingly, although the * mills, and machinery [*15] and buildings, by means of which the business was carried on, clearly belonged to one partner only.

Other instances of partnership in profits, although there is no community of interest in the capital or stock producing them, will be noticed when the subject of partnership property is examined (b).

3.—*Partnership is primâ facie the result of an agreement to share profits, although community of loss is stipulated against.*

Sharing profits but not losses.—Persons who agree to share the profits of an adventure in which they engage, are *primâ facie* partners, although they stipulate that they will not be liable for losses beyond the sums they engage to subscribe (c).¹

(z) 3 Mc. & G. 250. The servant claimed a right to take an active part in the management of the business. So in *Walker v. Hirsch*, 27 Ch. D. 460. In *Pawsey v. Armstrong*, 18 Ch. D. 698, the clerk shared losses as well as profits, but *quere* whether he was entitled to all he got.

(a) 4 Ir. Com. L. Rep. 501. The real truth here seems to have been that the plaintiff intended to create a

partnership, whilst the defendant did not.

(b) In *Meyer v. Sharpe*, 5 Taunt. 74, the distinction between an interest in profits and an interest in the goods by the sale of which those profits were to be produced was held to be clear and manifest. See, too, *Smith v. Watson*, 2 B. & C. 401.

(c) *Brown v. Tapscott*, 6 M. & W. 119.

the profits, it was held that there was a partnership. *Reynolds v. Pool*, 84 N. C. 37; s. c. 37 Am. Rep. 607 and note 609. And in *Holt v. Kernodle*, 1 Md. 199, where a blacksmith agreed with the proprietors of a blacksmith's shop, whereby they were to provide everything for the business and support for his family, and, after payment of all advances, the residue was to be divided equally, it was held a partnership. See also *Lewis v. Wilkins*, Phil. 303; *Pratt v. Langdon*, 12 Allen, 544; s. c. 97 Mass. 97; *Ambler v. Bradley*, 6 Vt. 119; *Autrey v. Frieze*, 60 Ala. 587; *Pettee v. Appleton*, 114 Mass. 114; *Leggett v. Hyde*, 58 N. Y. 272, 17 A. R. 244; *Stroher v. Elting*, 97 N. Y. 102; s. c. 49 A. R. 515; *Beauregard v. Case*, 91 U. S. 134; *Seymour v. Freer*, 8 Wall. 202.

¹ Where there is community of profits there may be a partnership even if community of loss is stipulated against. *Berthold v. Goldsmith*, 24 How. 536, 16 L. ed 762; *Pollard v. Stanton*, 7 Ala. 761; *Consolidated Bank v. State*, 5 La. Ann. 44; *Richards v. Grinnell*, 63 Iowa, 44; s. c. 50 Am. Rep. 727; *Priest v. Chouteau*, 85 Mo. 398; s. c. 55 Am. Rep. 373.

But as between lender and borrower the question turns on what is the real agreement. *Rosenfield v. Haight*, 53 Wis. 260; s. c. 40 Am. Rep. 770; *Gallop*

Stipulations against community of loss. — The inference that where there is community of profit there is a partnership is so strong that, even if community of loss be expressly stipulated against, partnership may nevertheless subsist. In *Coope v. Eyre (d)*, Lord Loughborough is reported to have said, "In order to constitute a partnership, communion of profits and loss is essential." But there is nothing to prevent one or more partners from agreeing to indemnify the others against loss, or to prevent full effect from being given to a contract of partnership containing such a clause of indemnity (*e*).

Contracts of loan compared with contracts of partnership without community of loss. — The true effect of such a complex agreement would, it is apprehended, be to entitle each of the partners to a share of the excess of the returns over the advances, while some of the partners would be entitled to be indemnified by the others for all losses *beyond the advances*. If this were not the result of the agreement, and if the persons indemnified were indemnified not only [*16] against losses beyond the advances, but also * against the loss of the advances themselves, the contract would lose its character of a contract of partnership, and become a contract of loan (*f*).

Usurious loans confounded with partnerships. — Whilst the laws against usury were in force, a tendency was sometimes manifested to treat what was in truth a loan at usurious interest and therefore illegal, as a contract of partnership and therefore legal (*g*). This view of the transaction had

(*d*) 1 H. Blacks, 48.

(*e*) See *Bond v. Pittard*, 3 M. & W. 357; *Geddes v. Wallace*, 2 Bligh, 270.

(*f*) See *Pothier, Contrat de Société*, §§ 21 & 22. Compare *Pooley*

v. Driver, 5 Ch. D. 458, noticed *infra*, § 2.

(*g*) See *Bloxham v. Pell*, cited 2 Wm. Blacks. 999; and compare *Morse v. Wilson*, 4 T. R. 353, and 7 Byth. Conv. p. 163, edit. 2.

v. Newman, 7 Pick. 282; *Emmons v. Westfield*, 97 Mass. 230; *Adams v. Fink*, 53 Ill. 219; *Boston & Colorado Smelting Co. v. Smith*, 13 R. I. 27; s. c. 43 Am. Rep. 3; *Smith v. Vanderburg*, 46 Ill. 34; *Ruddick v. Otis*, 33 Iowa, 402; *Eagar v. Crawford*, 76 N. Y. 97; *Curry v. Fowler*, 87 N. Y. 33; s. c. 41 Am. Rep. 343; *Lord v. Proctor*, 7 Phil. 630; *Darling & al v. Bellhouse & al*, 19 Ont. Q. B. 268; *Hill & al v. Bellhouse*, 10 Ont. C. P. 122; *Munson v. Hall*, 10 Ont. Chancery, 61; *Lintner v. Millikin*, 47 Ill. 178; *Richardson v. Hughett*, 76 N. Y. 55; s. c. 32 Am. Rep. 267; *Hart v. Kelly*, 83 Pa. St. 286; *Everett v. Coe*, 5 Den. 180; *Gibson v. Stone*, 43 Barb. 286; *Smith v. Knight*, 71 Ill. 148; s. c. 22 Am. Rep. 94; *Curley v. Edwards*, 44 Ark. 423; s. c. 51 Am. Rep. 614; *Pinkney v. Keyler*, 4 E. D. Smith, 469; *Salter v. Ham*, 31 N. Y. 321.

the merit of apparently holding the parties to their bargain ; but in truth the bargain to which they were held was very different from that which they themselves had contemplated ; and by treating such transactions as partnerships and not as loans an amount of confusion was introduced into this branch of the law which even the repeal of the usury laws failed to remove. The leading cases on this subject are *Gilpin v. Enderby* (*h*) and *Fereday v. Hordern* (*i*). They decided that a loan of money on the terms that the lender should share the profits of the borrower rendered the lender liable to third persons, as if he were a partner with the borrower ; and that by reason of such risk the loan was not usurious. The judgments in these cases show that the borrower and lender were regarded by the Court as partners *inter se*.

These cases, however, cannot now be relied upon ; for, as will be seen hereafter, the mere fact that a lender of money shares profits with the borrower will not make the lender liable as a partner ; and as between the borrower and the lender the question of partnership or no partnership turns on the real agreement between them (*k*).¹

Dormant partners. — At the same time even now a person who is really a partner although dormant (*i.e.*, a partner taking no part in the management of the partnership) will be treated as such, although he may have endeavoured to

(*h*) 5 B. & A. 954.

(*k*) See the cases of servants

(*i*) Jac. 144 ; see also *Ex parte* sharing profits, *ante*, pp. 12, 13.
Briggs and Ex parte Notley, 3 D. &
 Ch. 367.

¹ In *Emmons v. Westfield Bank*, 97 Mass. 230, an insolvent person made a stipulation with a creditor, by which the debtor was appointed agent to buy, sell, and manufacture goods with funds of the creditor, the creditor to receive his advances and ten per cent of the profits. Goods in the possession of the debtor during this arrangement were attached by another creditor, and in an action by the first creditor who furnished the funds, against the attaching creditor for conversion, it was held that the relation between the parties to the stipulation was that of principal and agent, and not that of partnership, and that the goods were not the property of the debtor. See *Seymour v. Freer*, 8 Wall. 202, 19 L. ed 306 ; and *Beauregard v. Case*, 91 U. S. 134, 23 L. ed. 263.

In *Burnett v. Snyder*, 81 N. Y. 550 ; s. c. 37 Am. Rep. 527, a third person made an agreement with two members of a partnership by which he was to have one-third of the profits and pay one-third of the losses they might sustain by reason of the relation as co-partners of the principal firm. This arrangement was held not to involve him in the consequences, or subject him to the responsibilities of the partnership. See *post*, p. 48, subject, Sub-partnerships.

conceal his true character under the cloak of being a
 [*17] mere lender of money (*l*).¹ Whether a person *advancing money and sharing profits is a creditor or a dormant partner is often a very difficult matter to determine, and can only be decided by a careful study of the whole agreement between the borrower and the lender, and especially by examining what rights are conferred on or taken from the person making the advance. The right of a lender is to be repaid his money with such interest or share of profits as he may have stipulated for; and his right to a share of profits involves a right to an account and to see the books of the borrower, unless such right is expressly excluded by agreement. If however a lender stipulates for more than this (*e.g.*, for a right to control the business or the employment of the assets, or to wind up the business) or if his advance is risked in the business, or forms part of his capital in it, he ceases to be a mere lender and becomes in effect a dormant partner. In illustration of these remarks, reference may be made to *Mollwo, March & Co. v. Court of Wards* (*m*)

(*l*) See *Pooley v. Driver*, 5 Ch. D.
 458, noticed *infra*, § 2.

(*m*) L. R. 4 P. C. 419. *Infra*, p. 38,
 note (*d*).

¹ A dormant partner is one whose name and transactions are unknown to the world, at least to such extent that he cannot be regarded an ostensible partner. *Metcalf v. Officer*, 2 Fed. Rep. 640.

The general principles of commercial law, and not the particular stipulations of the agreement, determine the responsibility of unavowed partners. *Winship v. Bank of U. S.*, 5 Pet. 529.

Where one furnished money to buy goods, with the statement that he was to have no interest on his money if losses occurred, and afterwards stated that the interest of his money was to offset the labor of N., and that they were partners, the court held that it was a partnership and not a loan. 1 W. Va. 163.

So in *Mason v. Patridge*, 66 N. Y. 633, where P. and W. entered into agreement in writing whereby P. agreed to furnish \$2000 to be used in buying and selling goods, the business to be conducted by W., and P. not to be liable beyond the \$2000 and the profits to be divided. Large quantities of goods were bought on credit of parties who knew the agreement between P. and W. with the knowledge of P., and it was held that he was a partner, and the limitations having been disregarded with his knowledge furnished no defence to an action by a creditor.

Where one supposed he was to become a special partner and be liable only for his advances, and did not comply with the statute, he was held a general partner. *Tournade v. Methfessel*, 3 Hun, 144.

Persons who deal with a firm in ignorance of secret restrictions between partners are not affected by them. *U. S. Bank v. Binney*, 5 Mass. 176. And see *Etheridge v. Binney*, 9 Pick. 272; *Pierce v. Bryant*, 5 Allen, 91; *Lea v. Guice*, 13 Smede & M. 656; *Leggett v. Hyde*, 58 N. Y. 272; *Plunkett v. Dillon*, 4 Houston, 338; *Waite v. Dodge*, 34 W. 181; *Hastings v. Hopkinson*, 28 W. 108; *Fosdick v. Van Horn*, 40 Ohio St. 459.

on the one hand, and *Pooley v. Driver* (*n*) on the other (*o*). In both there was an advance of money and a stipulation for a share of profits; and in both the lender had unusual powers; but in the former case the court came to the conclusion that a loan on security was all that was really intended; whilst in the latter the Court considered that the lender was really a dormant partner, although he had done his best to avoid the liabilities incident to that position.

4.—*Partnership is not the result of an agreement to share gross returns.*

Sharing gross returns.—Although, as has been already pointed out, those who share gross returns share profits, if any there be, for gross returns include profits, and although at common law an agreement to share profits is *primâ facie* an agreement for a partnership, yet it has long been held that a partnership is not the result of an agreement to share gross returns (*p*).¹

If several persons make advances for a common object and agree to share the gross returns in proportion to their advances, * this does not create such a community of [*18] interest in profit or loss as to make such persons partners. Thus, in *Gibson v. Lupton* (*q*), where two persons joined in the purchase of wheat with the intention of paying for it and dividing it equally, it was held that they were not partners. So, if two workmen agree to divide their wages, that, *per se*, does not make them partners (*r*).

Co-owners sharing gross returns.—But the strongest illus-

(*n*) 5 Ch. D. 458.

(*o*) They are referred to more at length hereafter, in § 2.

(*p*) See the preliminary remarks, *ante*, pp. 8, 9.

(*q*) 9 Bing. 297. See further, as to joint purchasers, *Coope v. Eyre*, 1 H. Blacks. 37; and *Hoare v. Dawes*, 1 Doug. 371, and *post*, § 6.

(*r*) See *Finckle v. Stacey*, Select Ca. in Ch. 9.

¹ In *Day v. Stevens*, 88 N. C. 83, the owner of a farm agreed to furnish to a lessee teams and feed for them to be used in carrying on the farm, the lessee supplying the labor, and the gross product to be equally divided. The lessee made a contract for the sale of the entire crop, and in an action for damages for non-delivery in which the plaintiff set up the relationship between the parties and claimed that they were partners, the court citing *Reynolds v. Pool*, *ante*, p. 14, and *Manney v. Coit*, 86 N. C. 463, held that the essential elements of a partnership were wanting, *i.e.*, community of profit and loss, and that sharing the gross product of the farm did not make the parties partners.

trations of this doctrine are afforded by those cases in which co-owners of chattels divide the earnings of the chattel. The distinction between co-owners and co-partners will be noticed hereafter, but as an instance in which co-owners have been held not to be partners, although they agreed to divide the returns obtained by the use or employment of the thing owned, reference may be made to *French v. Styring* (*s*). There the plaintiff and defendant were entitled in common to a race-horse. It was agreed that the plaintiff should keep, train, and have the management of the horse, that thirty-five shillings a week should be allowed for the expenses of his keep, that the plaintiff should pay the expenses of entering the horse and conveying him to the different races, and that one-half of the horse's keep and other expenses and his winnings should be equally divided between the plaintiff and the defendant. This agreement was held not to create a partnership. It was no more a partnership than if two tenants in common of a house had agreed that one of them should have the general management and private funds for necessary repairs, so as to render the house fit for the habitation of a tenant, and that the net rent should be divided amongst them equally (*t*).

So where two persons were respectively lessee and manager of a theatre, and they shared the gross receipts equally, the manager paying the expenses out of his share, it was held that no partnership subsisted between them (*u*).

Wages payable by a share of produce.—Again, in [*19] whaling voyages the sailors are usually paid a *certain proportion of the produce of the oil obtained, but even before the act of 28 & 29 Viet. c. 86, they were not therefore partners, either with each other or with their employers (*x*). In such cases as this partnership was clearly not intended; and even when persons who shared profits

(*s*) 2 C. B. N. S. 357.

(*t*) See the judgment of Willes, J., 2 C. B. N. S. 366.

(*u*) *Lyon v. Knowles*, 3 B. & S. 556.

(*x*) *Mair v. Glennie*, 4 M. & S. 240; *Wilkinson v. Frazier*, 4 Esp. 182; and see *Perrott v. Bryant*, 2 Y. & C. Ex. 61. See also *Stavers v. Curling*, 3 Bing. N. C. 355, where the captain was to be paid a sum equal to 12 per cent. on the net proceeds,

after deducting certain expenses. He brought an action for what was due to him, and recovered, but no question of partnership arose. Some of the customs established amongst whalers will be found in *Fennings v. Grenville*, 1 Taunt. 241, where it was held that one of two tenants in common of a whale could not maintain trover against his co-tenant for half of the blubber, &c., yielded by the whale.

were held to incur liabilities as if they were partners, it was held that persons who merely divided gross returns, did not incur any such liabilities (*y*). *A fortiori* it was impossible to regard them as partners *inter se*. The act of 28 & 29 Vict. c. 86, which will be noticed hereafter, renders this even clearer than before.

5.—*Partnership is not the result of an agreement which is not concluded.*

Unconcluded agreements.—In order that partnership may result from any agreement, it is necessary that the parties to the agreement shall have mutually assented to the same propositions; otherwise there is no contract at all, but merely a treaty from which each party is at liberty to retire.¹ If, therefore, A. proposes to B. that a partnership shall be formed between them on certain terms, and B. either does not accept the proposal or accepts it on other terms than those offered, A. and B. are not yet agreed and no partnership subsists between them. Nor is B. bound by his qualified acceptance; for that is merely a counter offer on his part which he is at liberty to retract until A. has assented to all its terms without qualification.²

There are many decisions illustrating these principles, but they relate more particularly to agreements to take shares in companies, and it is unnecessary to consider them here (*z*).

(*y*) *Post*, § 2.

(*z*) See the next page. In *McClean v. Kennard*, 9 Ch. 336, an agree-

ment to become partners with executors was held to create a partnership with those only who proved.

¹ See note, p. 22.

² Where negotiations were had between A. & B. in reference to a partnership, in the business then carried on by B., and A. agreed to lend money to B. for use in the business, but made no agreement to form a present partnership, A. having an option to become an equal partner with a right to share the profits from a day named, and the sums loaned to B. to be, in that event, a part of A.'s contribution to the capital of the firm, B. used the money and credited A. with interest instead of half the profits of the business. A. claimed to be a partner, and to be entitled to half the profits, but B. did not admit this and never intended to carry out the original understanding. A. thereupon brought an action upon notes given by B. for the money so loaned. The court say, "No partnership was formed by this agreement; it was, in its nature, an executory agreement that a partnership should be formed, and that the plaintiff should be admitted as a partner in the future when he signified that he desired to become a partner." *Morrill v. Spurr*, 143 Mass. 257.

[*20] * Cases in which there is no contract, because there has never been a mutual assent to the same terms, must not be confounded with cases in which a valid contract has been entered into, but which, being conditional, and not having been performed on the one part, is not binding on the other. These will be considered hereafter.

6. — *Partnership is not the result of an agreement to share profits so long as anything remains to be done before the right to share them accrues.*

Contemplated partnerships. — It is important to distinguish between actual and contemplated partnerships. Persons who are only contemplating a future partnership, or who have only entered into an agreement that they will at some future time become partners, cannot be considered as partners before the arrival of the time agreed upon (*a*).¹ It is not always easy to determine whether an agreement amounts to a contract of partnership or only to an agreement for a future partnership. The test, however, is to ascertain from the terms of the agreement itself whether any time has to elapse or any act remains to be done before the right to share profits accrues; for if there is, the parties will not be partners until such time has elapsed or act has been performed (*b*).

The general principle that so long as an agreement to form a partnership is executory, no partnership is formed, applies as well to ordinary partnerships as to projected companies, and it will be useful to consider it with reference to each in turn.

(*a*) *Application of the principle to ordinary partnerships.*

Option to become a partner. — It is not unusual for a person who contemplates joining another in business to agree that such business shall be carried on upon certain terms

[*21] not themselves creating a partnership, * and to stipulate for an option to become a partner either at a specified time, or at any time the person having the option may choose. Such agreements, if *bonâ fide*, and not mere

(*a*) *Per* Parke, J., in *Dickinson v. Valpy*, 10 B. & C. 141, 2.

(*b*) See in addition to the cases cited below *Drennen v. London Ass.*

Co., 6 Davis Sup. Ct. Rep. 25; 116 U. S. 461; *Osborne v. Jullion*, 3 Drew, 596, where the partnership (?) depended on the result of experiments.

¹ See note, p. 22.

colourable schemes for creating a partnership, and at the same time concealing it (*c*), do not create a partnership until the person having the option has exercised it, and elected to become a partner.¹

A strong illustration of this is afforded by *Ex parte Davis* (*d*), where a creditor had a right to nominate himself as a partner with his debtor but had not exercised the right.

Again, in *Gabriel v. Evill* (*e*), it was agreed between the defendant and two others that the defendant should enter into partnership with them, and bring in 1000*l.* in cash, and 1000*l.* in goods, and that the partnership should date retrospectively from the 1st of January: but the defendant reserved to himself the option of determining at any time within twelve months from that day whether he would become a partner or not. The defendant advanced the 2000*l.*, and several other acts were done in execution of the agreement; but within the twelve months the defendant declared his option not to become a partner, and it was held that he never did in fact become one, and that he had not incurred any liability as if he had (*f*).

In *Price v. Groom* (*g*), a debtor's business was carried on by him under an inspectorship deed, which authorised the trustees to carry on the business themselves, and to take the profits, if they chose. Their interest in the profits, however, did not commence until the debtor's interest determined; and it was held that whilst he carried on the business there was no *partnership between him and them, [*22] they and he not being entitled to the profits at the same time.

Share not yet taken.—In *Howell v. Brodie* (*h*), the de-

(*c*) See *Courtenay v. Wagstaff*, 16 C. B. N. S. 110.

(*d*) 4 De G. J. & Sm. 523. The agreement was in the form of a bond, and was, as Lord Westbury remarked, "an ingenious piece of mechanism." Such an agreement, however, cannot be relied upon as affording protection against third parties.

(*e*) 9 M. & W. 297, and *Car. & Marsh*, 358. See, too, *Ex parte Turquand*, 2 M. D. & D. 339, which turned on the same agreement. See,

also, *Re Hall*, 15 Ir. Ch. 287, a similar case.

(*f*) Compare this case with *Jeferys v. Smith*, 3 Russ. 158. There A. agreed to purchase B.'s share in a firm; A. acted and was treated as a partner by the other 'members, but afterwards rescinded the contract with B.: it was held that a partnership nevertheless subsisted between A. and B.'s co-partners.

(*g*) 2 Ex. 542.

(*h*) 6 Bing. N. C. 44.

¹ See *Hill v. Bellhouse and Darling v. Bellhouse*, 10 Ont. C. P. 122; s. c. 19 Ont. Q. B. 268, *infra* note 1, p. 25.

fendant, intending to become a partner in a scheme for making and letting out a market-place, advanced considerable sums of money, and ultimately, on the completion of the market, took one-seventh share in it. It was sought to make him liable for the expense of erecting the market, on the ground that he was a partner with those by whom the plaintiff had been employed; but the Court held that there was no partnership between them and the defendant until the share was taken by him.

Share of profits expected in lieu of salary. — In *Burnell v. Hunt* (*i*), an agreement was come to between A. and B. that A. should take premises and purchase machinery and materials to carry on the business of a silk lacemaker, and that B. should manage the business and receive half the profits as soon as any accrued, and should, in the meantime, be paid 2*l.* a week. It was held that so long as the 2*l.* per week continued payable, there was no partnership (*k*).

Partnership articles to be drawn up. — Persons who agree to become partners may be partners although they contemplate signing a formal partnership deed and never sign it (*l*). But if they are not to be partners until they sign formal articles of partnership, and if they do not so act as to waive the performance of such condition, they will not be partners until it has been performed.¹ Where, however, two persons agreed to become partners from a subsequent day, upon

(*i*) 5 Jur. 650, Q. B. The real point here was whether B. had any interest in the *goods*, which he clearly had not, and would not have had even if there had been profits to divide.

(*k*) See, too, *Ex parte Hickin*, 3 De G. & S. 662.

(*l*) As in *Syers v. Syers*, 1 App. Ca. 174.

¹ In *Atkins v. Hunt*, 14 N. H. 205, the court says, "There is of course an essential difference between a mere proposition to form a partnership and its actual constitution. But a difficult question often arises as to where the proposition to make the contract ends, and the contract itself begins.

In *Davis v. Evans*, 39 Vt. 182, an army sutler proposed to E. to take him in as partner with himself and another, and to furnish all the capital and give to each of them one-fourth of the profits. E. on his part assented. E. thereupon, and before the other party had been informed of the offer of the sutler, purchased goods in his own name which afterwards became a part of the sutler's stock. After the goods had been substantially disposed of, a partnership was formed as originally proposed, and in an action to recover for the goods sold to E. it was held that the partnership was not completed, and that E. alone was liable for the goods.

See *National Bank of Chemung v. Ingraham*, 58 Barb. 290; *Mousseau v. Thebens*, 19 La. Ann. 516; *Monroe v. Greenhoe*, 54 Mich. 9; *Morrill v. Spurr*, 143 Mass. 257.

certain terms to be embodied in a deed to be executed on that day: it was held that the partnership began on the day mentioned, although the deed was not executed until afterwards, and although alterations were made in it immediately before its execution (*m*). In this case, however, the *parties did in fact commence business as partners [*23] on the day named, and it was wholly immaterial (as regarded the question before the Court) what the terms of the partnership were.

(*b*) *Application of the principle to Promoters of companies.*

Promoters of companies not partners.—Promoters of companies are not partners; they are, it is true, engaged in a common object, and that object is ultimately to share profits; but their immediate object is the formation of a company, and they are only in the position of persons who intend to become partners after the company is formed. It was indeed said, in *Holmes v. Higgins* (*n*), that the projectors of a railway were partners, they being associated for the purpose of procuring the act of Parliament necessary to form the company and subscribing money for that purpose; and, in *Lucas v. Beach* (*o*), the Court held that persons associated for the purpose of passing a turnpike act, and who had subscribed for shares in the proposed road, were partners. But in each of these cases the real question was, whether the plaintiff was entitled to recover from the defendants by virtue of any *implied* contract, any remuneration for services rendered by him for the joint benefit of himself and them. It was held that he was not; and if the Court had likened the case to one of partnership, instead of saying that the plaintiff and the defendants were partners, there would be no room for criticism. As it is, however, the cases are apt to be considered, and are sometimes cited, as authorities for the proposition that persons engaged in passing through Parliament, bills to authorise the establishment of a company, are partners. In *Lucas v. Beach* it was asked in argument, "What is there to prevent a number of individuals from entering

(*m*) *Battley v. Lewis*, 1 Man. & Gr. 155; and see *Wilson v. Lewis*, 2 ib. 197. Compare *Ellis v. Ward*, 21 W. R. 100, where the intended partners quarrelled before they signed the deed.

(*n*) 1 B. & C. 74.
(*o*) 1 Man. & Gr. 417. *Barnett v. Lambert*, 15 M. & W. 489, was a similar case.

into a partnership with a limited object, in the first instance, of procuring an act of Parliament, and with an ulterior object in view when the act is passed?" (*p*). The answer is, that to call persons so associated partners is to ignore the difference between a contract of partnership and an agreement to enter into such a contract, to confound an agreement with its result, and to hold persons to be partners [*24] *although they have not yet acquired any right to share profits. It cannot be contended that the right to share profits would, under such an agreement as is supposed, accrue before the passing of the act, and if not, how can the parties to such an agreement be *partners* at an earlier period?

For these reasons it is conceived that *Holmes v. Higgins* and *Lucas v. Beach* cannot be relied upon as authorities on the question of partnership or no partnership (*q*). Nor are they on this point reconcilable with later decisions.

Later authorities.—In *Reynell v. Lewis* (*r*), and *Wyld v. Hopkins* (*r*), in which the question was much discussed, it was held that no partnership subsisted between persons who had subscribed for the purposes of forming a railway company and of procuring the necessary act of Parliament; and this, which is the correct doctrine, was also distinctly stated by Lord Cranworth, in *Capper's case* (*s*), and has been recognised on many other occasions (*t*).

Subscribers to inchoate companies not partners.—It is a necessary result of the principles established above that persons associated for the purpose of forming a joint stock company are not partners (*u*). They clearly are not partners in the company to be formed; and for reasons already given they cannot be considered as members of a partnership formed to start the company.

(*p*) See, too, *per* Lord Brougham in *Hutton v. Upfill*, 2 H. L. C. 691.

(*q*) They are authorities for the point actually decided, viz., that a person doing work for the joint benefit of himself and others, cannot recover compensation from them by virtue of any *implied* promise to pay him.

(*r*) 15 M. & W. 517.

(*s*) 1 Sim. N. S. 178.

(*t*) *e.g.* *Batard v. Hawes*, and *Batard v. Douglas*, 2 E. & B. 287;

Walstab v. Spottiswoode, 15 M. & W. 501; *Forrester v. Bell*, 10 Ir. Law R. 555; *Hutton v. Thompson*, 3 H. L. C. 161; *Bright v. Hutton*, 3 H. L. C. 368; *Hamilton v. Smith*, 5 Jur. N. S. 32; *Norris v. Cottle*, 2 H. L. C. 647; *Besley's case*, 3 Mac. & G. 287; *Tanner's case*, 5 De G. & S. 182.

(*u*) *Wood v. Argyll*, 6 Man. & Gr. 928; *Hamilton v. Smith*, 5 Jur. N. S. 62; *Hutton v. Thompson*, 3 H. L. C. 161; *Bright v. Hutton*, *ib.* 368.

Conditional contract. — It also follows from the same principles, that if persons enter into an agreement to take shares in a company formed for certain purposes and upon certain conditions, those persons are not bound to take shares in a company formed for different purposes or upon other conditions; and are not partners in such a company, unless they have accepted shares therein and *precluded [*25] themselves from objecting to the variation of their agreement. A leading case on this subject is *Fox v. Clifton (x)*, which, with other cases of the same class, will be found in the volume relating to companies and contributories.

SECTION II. — OF QUASI-PARTNERSHIPS.

Quasi-Partnerships. — Having now examined the nature of those agreements which are, properly speaking, contracts of partnership, it is necessary to advert to the doctrines by virtue of which persons who are not partners at all, are nevertheless made subject to liabilities as if they were partners. In other words, it is necessary to explain what it is that creates a *quasi*-partnership, or, as it is usually called, a partnership as regards third persons. This will involve an examination of the liability which a person incurs:

1. By sharing profits.
2. By holding himself out as a partner.

1. *By sharing profits.*¹

In the year 1775, De Grey, C. J., laid down the proposition in *Grace v. Smith (y)*, that “every man who has a share of

(x) 6 Bing. 776.

(y) 2 Wm. Blacks. 998.

¹ In *Berthold v. Goldsmith*, 24 How. 537, which was decided by the Supreme Court of the United States at the December Term, 1860, Judge Clifford in delivering the opinion of the court says: “Participation in the profits, however, will not create a partnership between the parties themselves as to the property, contrary to their intention. Actual participation in the profits as *principal*, we think creates a partnership as between the parties and third persons, whatever may be their intentions in that behalf. In *Eastman v. Clark*, 53 N. H. 276, the court held that while an agreement to share profits of a business is competent evidence to show that the person receiving them is a partner, it is not a conclusive legal test, unless the recipient shares them as a principal. And his liability depends upon the question whether he is a prin-

the profits of a trade, ought also to bear his share of the loss." Eighteen years afterwards, viz., in 1793, this doctrine was

capital and bound by his own acts or those of his agent, or whether by his acts he is estopped to deny that he is a principal. Referring to Lord Cranworth's opinion in *Cox v. Hickman*, 9 C. B. 92, that 'a right to participate in profits no doubt is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made, was carried on in part for, or on behalf of, the person setting up such a claim,' Doe J. says (p. 340), 'By a sufficiently accurate test' he meant satisfactory evidence. His remark suggests how easily a piece of evidence could be transformed into a legal test *sub modo*, by tribunals accustomed to declare their judgments on questions of fact. When Lord Cranworth said sharing-profits afford cogent evidence of a partnership, he expressed his opinion on a question of fact, and the evident soundness of such an opinion tends to obliterate the distinction between the law and the fact of the subject. Sharing-profits, in the absence of all other evidence, would, as a matter of fact, be cogent evidence of a partnership; but every item of cogent evidence is not a legal test; moreover, it is generally impossible to have no other evidence in a case than sharing-profits; whether it is cogent or weak depends upon its character explained by other circumstances; in this jurisdiction, the judge does not give the jury his opinion of the strength of the evidence."

In the recent case of *Parchen v. Anderson*, 5 Montana, 438, Wade C. J. in an elaborate opinion discusses the whole subject and reviews the authorities, both English and American. In this case two partners sold to N. one-fourth of the profits of their mill. There was no claim that N. held himself out as a partner, or that the plaintiffs were induced to give credit to the firm by reason of his being a member of it, or by reason of any act or representation of his. It was accordingly held that N. was not liable as a partner.

A partnership is not conclusively established by participation in the profits, but such participation must be considered as evidence tending to show a partnership, and, in the absence of other proof, is to be regarded as sufficient to make out a partnership. *Meehan v. Valentine*, 29 Fed. Rep. 276 (U. S. C. Ct. E. D. Penn. 1886).

In *Cassidy v. Hall*, 97 N. Y. 159, the Court of Appeals say, "The question was distinctly presented in *Richardson v. Hughtitt*, 76 N. Y. 55, and it was there held that a person who has no interest in the business of a firm, or in the capital invested, save that he is to receive a share of the profits as compensation for services or for money loaned for the benefit of the business, is not a partner, and cannot be held as such by a creditor of the firm. That case was upheld and approved in *Curry v. Fowler*, 87 N. Y. 33, and the principle decided is fully sustained in *Eager v. Crawford*, 76 id. 97, and *Burnett v. Snyder*, id. 344."

In *Buzard v. Bank of Greenville*, 67 Tex. 89, the court reviews the previous decisions in that State, and holds that where one furnishes money to another, under an agreement that he who receives it as agent for the owner, is to use it in a designated business, and receive a part of the net profits as compensation for his services, he who thus receives the money is not thereby made a partner.

These cases and the following fairly exhibit the state of the decisions in the United States upon this question, showing that the doctrine of *Cox v. Hickman* is the correct principle for determining the relation of partners where there is a share of profits by one who does not sustain the position of principal. *Boston Smelting Co. v. Smith*, 13 R. I. 3. See also *Lee v. Bullard*, 3 La. Ann. 462; *Smith v. Knight*, 71 Ill. 148; *Holmes v. Old Colony R. R. Co.*, 5 Gray, 58; *Heckert v.*

discussed and approved in the celebrated case of *Waugh v. Carver* (z); and ever since that time until 1860 it was con-

(z) 2 H. Blacks. 235.

Fegely, 6 Watts & S. 139; *Polk v. Buchanan*, 5 Sneed, 721; *Jones v. O'Farrel*, 1 Nev. 354; *Turner v. Bissell*, 14 Pick. 192; *Hill v. Bellhouse*, 19 Q. B. 268 (Ont.); *Pomeroy v. Sigerson*, 22 Mo. 177; *Cutler v. Winsor*, 6 Pick. 335; *Denis v. Saunders*, 36 Mich. 369; *Ford v. Smith*, 27 Wis. 261; *Bowyer v. Anderson*, 2 Leigh, 550; *Dale v. Pierce*, 85 Pa. St. 474; *Gibson v. Stevens*, 7 N. H. 352; *Darling v. McClelland*, 2 Russell & C. 164 (N. S.). And see particularly the following cases: *Eastman v. Clark*, 53 N. H. 276 (1873); s. c. 16 Am. Rep. 192; *Campbell v. Dent*, 54 Mo. 332 (1873); *Harvey v. Childs*, 28 Ohio St. 321 (1876); *Wood v. Vallette*, 7 Ohio St. 172; *Leggett v. Hyde*, 58 N. Y. 272; s. c. 17 Am. Rep. 244; *Burnett v. Snyder*, 81 N. Y. 550; s. c. 37 Am. Rep. 527; *Beecher v. Bush*, 45 Mich. 193 (1881); s. c. 40 Am. Rep. 465; *Beauregard v. Case*, 91 U. S. 134; *Thompson v. First Nat. Bank of Toledo*, 111 U. S. 540 (1883); *Hinnman v. Littell*, 23 Mich. 484; *Uhl v. Harvey*, 78 Ind. 26; *Cook v. Penrhyn Slate Co.*, 36 Ohio St. 135; *Hefner v. Palmer*, 67 Ill. 161; *Kirk v. Hartman*, 63 Penn. St. 97; *Sherrod v. Langdon*, 21 Iowa, 518; *Wood v. Pennell*, 51 Me. 52; *Hicks v. Cram*, 17 Vt. 449; *In re Ward*, 8 Fed. Rep. 136; *Re Francis*, 2 Sawy. 286; *Poillon v. Secor*, 61 N. Y. 456; *Central Savings Bank v. Walker*, 66 N. Y. 424; *Shaw v. Galt*, 1. R. 16 C. L. 375; *Osborne v. Brennan*, 2 Nott. & McC. 427; *Reynolds v. Pool*, 84 N. C. 37; s. c. 37 Am. Rep. 607; *Colwell v. Britton*, 59 Mich. 350; *Darrow v. St. George*, 8 Colo. 592; *Holbrooke v. Oberne*, 56 Iowa, 324; *Nicolaus v. Therlges*, 50 Wis. 491; *Beecher v. Bush*, 45 Mich. 188; *Richards v. Grinnell*, 63 Iowa, 44; *Ruddick v. Otis*, 33 Iowa, 402.

Where a percentage of profits is adopted simply as a mode of measuring the amount of wages or salary of a clerk, the fact that it is contingent upon profits does not create a partnership. *Sangston v. Hack*, 52 Md. 173. Where two rival cattle dealers, to avoid conflict, agreed that they would divide the profits on cattle bought in the same neighborhood, and to this end assisted each other in purchasing and shipping cattle, but each furnished his own capital, an individual creditor of one cannot hold stock bought and shipped by the other under this agreement. *Clifton v. Howard*, 89 Mo. 192; s. c. 58 Am. Rep. 97. See also learned note by reporter, 58 Am. Rep. 99, in which in addition to the authorities cited *supra*, he cites among other cases, *Loomis v. Marshall*, 12 Conn. 69; *Hanna v. Flint*, 14 Cal. 73; *Higgins v. Graham*, 51 Mo. 17; *Pond v. Cummins*, 50 Conn. 372; and *Le Fevre v. Casagnio*, 5 Colo. 564, to the point that the participant in profits as compensation for services is not liable as a partner of his principal or master, and *McDonnell v. Battle House Co.*, 67 Ala. 90; s. c. 42 Am. Rep. 99; *Christian v. Crocker*, 25 Ark. 327; *Jeter v. Penn*, 28 La. Ann. 230; s. c. 26 Am. Rep. 98; and *Day v. Stevens*, 88 N. C. 83; s. c. 43 Am. Rep. 732, that a lessor of property for a share of the profits as rent is not a partner; and *Hart v. Kelly*, 83 Penn. St. 286; *Boston & c. Smelting Co. v. Smith*, 13 R. I. 27; s. c. 43 Am. Rep. 3; *Cully v. Edwards*, 44 Ark. 423; s. c. 51 Am. Rep. 614; and *Slade v. Paschal*, 67 Ga. 541, that a lender of money for a share of the profits of a business is not liable to creditors as a partner.

A creditor agreed to give the debtor firm five years in which to pay him their debt out of the profits of the business, with the right for him at any time when the interest of each of the two partners should by reason of additions of capital to be made by them have become equal to the debt and interest at that time remaining due him, to become at his election a partner holding a third interest or to receive instead a bonus by way of compensation for his right to claim such third interest and in discharge of the debt so due him, such bonus to be a subject of arbitration; meanwhile, until such election,

sidered as clearly established, that by the law of England, all persons who shared the profits of a business incurred the liabilities of partners therein, although no partnership between themselves might have been contemplated. Subtle distinctions were drawn between sharing net profits and gross returns; and between sharing net profits and payments varying with them; but it was taken for granted, [*26] both by judges and *text-writers, that where there was no statutory enactment to the contrary, if net profits were shared, it necessarily followed that liabilities were incurred. Moreover, there were many persons of ability who maintained that this rule was based upon principles which were satisfactory and morally just. Other persons, however, took a different view of the propriety of the rule (a), and were unable to understand why a person lending money at a fixed rate of interest should be treated as a creditor, and

(a) See the report on the Law of Partnership, printed by order of the House of Commons, in 1851, and particularly the evidence of the late Commissioner Fane.

he to act as agent for the firm with fixed annual compensation therefor payable quarterly (such compensation and interest to cease when the partner's interests each equalled the debt), and balance sheet showing the firm's condition and business to be struck at regular intervals and submitted for his inspection.

Held, this did not make him a partner. *Hill & al v. Bellhouse*, 10 Ont. C. P. 122; *Darling v. Bellhouse*, Id.; *Darling v. Bellhouse*, 19 Ont. Q. B. 268. See *Crappen v. Patterson*, 19 Ont. Q. B. 160.

The rule that participation in the profits of a business was the test of partnership as to liability to creditors has been abandoned in England and generally in America, and now the test is whether the business has been carried on in behalf of the person sought to be charged as a partner; *i.e.* did he stand in the relation of principal towards the ostensible traders by whom the liabilities were incurred, and under whose management the profits have been made; but as between the parties themselves, the test has always been their actual intent. *Culley v. Edwards*, 44 Ark. 424.

Participation in profits has been held to constitute partnership as to third parties in many cases.

In *Rosenfield v. Haight*, 53 Wis. 260; s. c. 40 Am. Rep. 770, where H. agreed to loan and advance money, for not more than five years nor less than one year, for three-fifths the annual profits of the firm's business, guaranteed to be not less than \$3000 annually, and H. was given a lien on all the partnership property with a right to extend the time of the loan to ten years, and any violation of the contract on the firm's part was to be "an end of the loan," and H. could then seize the firm's property to satisfy his advances, H. was held a partner; distinguishing *Cooper v. Tappan*, 9 Wis. 361; *Ford v. Smith*, 27 id. 261; *Richardson v. Hughitt*, 76 N. Y. 55; s. c. 32 Am. Rep. 267; and *Eager v. Crawford*, 76 N. Y. 97; citing *Leggett v. Hyde*, 58 N. Y. 272; s. c. 17 Am. Rep. 244; *Whitney v. Ludington*, 17 Wis. 140; *Miller v. Price*, 20 id. 117; and *Upham v. Hewitt*, 42 id. 85. See also *Rowland v. Long*, 45 Md. 439; *Manhattan Brass & c. Co. v. Sears*, 45 N. Y. 797.

be exposed to no risk beyond the loss of his advance; whilst a person lending money at a rate of interest fluctuating with, and payable out of, the profits of the borrower should be treated as a partner, and be exposed, not only to the loss of his money, but also to the loss of whatever else he might have in the world. In the first edition of this work the writer expressed a hope that the rule in question would ere long cease to exist; and he ventured to characterise it as arbitrary, unjust, and as productive of the greatest confusion. Since those words were written the whole subject has been thoroughly discussed, both in the highest court of appeal (*b*), and in Parliament; and the result has been that the rule, so far as it affords a conclusive test of liability (*c*), has ceased to exist; for the House of Lords, and subsequently other courts, have repudiated it, and Parliament has excluded its application from many cases in which it has been found by experience to produce inconvenience and injustice. Some notice, however, of the old law is necessary to understand the modifications thus introduced.

1. *State of the law anterior to Cox v. Hickman.*

Origin of the rule that those who share profits are liable to losses.—As already stated, the rule that persons who share profits incur liabilities as if they were partners, was laid down for the first time in *Grace v. Smith* (*d*). The question there was whether the defendant was liable to a creditor of a firm; and the material facts were that the defendant (who had *been a partner, but who had notoriously retired before the creditor's demand arose) had advanced to the firm 4000*l.* upon the terms of being repaid the principal and of receiving, so long as it remained unpaid, interest at 5*l.* per cent. and an annuity of 300*l.* a-year. The verdict was for the *defendant*, and the Court refused a new trial. De Grey, C. J., gave his judgment as follows:—

Judgment in *Grace v. Smith*.—“The only question is, what constitutes a secret partner? Every man who has a share of the profits of a trade, ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment. And there is

(*b*) *Cox v. Hickman*, 8 H. L. C. 268. has been seen already, *ante*, p. 12, *et seq.*

(*c*) That participation in profits is still a *prima facie* test of partnership (*d*) 2 Wm. Blacks. 998.

no difference whether that money be lent *de novo*, or left behind in trade by one of the partners who retires; and whether the terms of that loan be kind or harsh, makes also no manner of difference. I think the true criterion is to inquire whether Smith (the defendant) agreed to share the profits of the trade with Robinson (the continuing partner), or whether he only relied on those profits as a fund of payment, a distinction not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits, and I think there is no foundation for granting a new trial."

This judgment and not the *decision* in the case, has always been regarded as the great authority for the proposition, that a person who shares profits is liable to third parties as if he were in fact a partner. The judgment itself appears to have been based upon a prior case of *Bloxham v. Pell* (*e*), before Lord Mansfield, and in substance undistinguishable from *Grace v. Smith*. In *Bloxham v. Pell*, an outgoing partner became entitled to be paid by the continuing partner a certain sum of money with interest at 5 per cent., and also an annuity of 200*l.* a-year for six years, in lieu of the profits of the trade. The plaintiff sued him for a debt contracted after the dissolution, and Lord Mansfield held the defendant liable, on the ground that the agreement was a device to make more than legal interest of money, and if it was not a partnership it was a crime; and it should not lie in the defendant Pell's mouth to say it was usury and not a partnership. Lord Mansfield did not say a word in favour of the doctrine laid down in *Grace v. Smith*; but seeing a contract which on the ground of usury was invalid as a contract of loan, he nevertheless upheld it as a contract of partnership, which it plainly was not, but which was the only alternative if the agreement was to be upheld at all (*f*).

Such was the origin of the rule in question, which was approved and applied in the well-known case of *Waugh v. Carver*, the leading old authority on this subject. In *Waugh v. Carver* (*g*), two ship-agents, carrying on business at different ports, agreed to allow each other certain portions of each other's commissions and profits, but it was expressly agreed that neither of them should be prejudiced or affected by [*28] the losses of the other,* or be answerable for the acts of the other, but each should be answerable and accountable for his own losses and acts. It was admitted by the Court that this agreement created no partnership as between the parties to it; but it was nevertheless held, on the principle enunciated in *Grace v. Smith*, that both parties to the agreement were answerable for the business debts of each, and a creditor who sued both for goods supplied to one, obtained judgment against both accordingly.

Applications of the foregoing doctrines.—Other cases, in which the same principle was applied, need only be shortly referred to. It was held that a *quasi*-partnership subsisted between merchants who divided the commissions received by each other on the sale of goods recommended

(*e*) Cited in 2 Wm. Blacks. 999.

(*g*) 2 H. Blacks. 235, and 1 Smith's

(*f*) See *Jestons v. Brooke*, Cowp. Lead. Ca. 793, and *ante*, p. 16.

or "influenced" by the one to the other (*h*); so between persons who agreed to share the profits of a single isolated adventure (*i*); and between persons, one of whom was in the position of a servant to the others, but was paid a share of the profits instead of a salary (*k*); and between persons, one of whom was paid an annuity out of the profits made by the others (*l*); or an annuity in lieu of any share in those profits (*m*). So between the vendor and purchaser of a business, if the former guaranteed a clear profit of so much a year and was to have all profits beyond the amount guaranteed (*n*).

Moreover, the character in which a portion of the profits was received did not affect the result. For a person who as executor or trustee merely employed money in trade or business, and shared the profits arising from it, incurred all the liabilities of a partner, although he in fact had personally no interest whatever in the matter (*o*). On the other hand, the *cestuis que trustent* were also liable; the creditors having an option against which of the two they would proceed (*p*).

Again, persons who shared profits were *quasi*-partners, although their community of interest was confined to the profits. In *Smith v. Watson* (*q*), a broker, who was paid by a share of the profits arising from the sales made by him, and who was therefore a *quasi*-partner with the person employing him, was nevertheless held to have no interest in the goods sold.

Distinction between sharing profits and gross returns.—But notwithstanding the extent to which the doctrine laid down in *Grace v. Smith* was carried, it was long ago established that [*29] persons who shared only gross returns, were not *quasi*-partners; and subtle distinctions were taken between a payment out of profits, and a payment varying with them, and between an agreement to share profits as such and an agreement to share profits not as profits, but as something else. These subtleties were attributable on the one hand to the establishment of the rule that persons who shared profits should be answerable for losses, and on the other to a disinclination to apply that principle to cases in which it was clear that those who shared the profits never intended to become partners *inter se*.

(*h*) *Cheap v. Cramond*, 4 B. & A. 663.

(*i*) *Heyhoe v. Burge*, 9 C. B. 431; *Ex parte Gellar*, 1 Rose, 297; *Hesketh v. Blanchard*, 4 East, 144.

(*k*) *Ex parte Digby*, 1 Deac. 341; *Ex parte Rowlandson*, 1 Rose, 92; and see *Withington v. Herring*, 3 Moo. & P. 30.

(*l*) *Re Colbeck*, Buck. 48; *Ex parte Hamper*, 17 Ves. 412; *Ex parte Chuck*, 8 Bing. 469.

(*m*) *Bloxham v. Pell*, 2 Wm. Blacks. 999, *ante*, p. 27.

(*n*) *Barry v. Nesham*, 3 C. B. 641. Compare *Pott v. Eyton*, ib. 32, *infra*, p. 30.

(*o*) *Wightman v. Townroe*, 1 M. & S. 412; *Ex parte Garland*, 10 Ves. 119; *Labouchere v. Tupper*, 11 Moore, P. C. 198.

(*p*) See *Goddard v. Hodges*, 1 Cr. & M. 33. In this case the court held that the *cestui que trust* was liable to creditors, and that *therefore* he could not sue the co-partners of his own trustee. But surely this was wrong. There was no partnership between the plaintiff and defendants, no contract between them.

(*q*) 2 B. & C. 401; and see *Burnell v. Hunt*, 5 Jur. 650, Q. B., and *Cheap v. Cramond*, 4 B. & A. 663.

First, as to gross returns. In *Benjamin v. Porteus* (r), an agreement was made between the plaintiff and a broker, by which the broker, instead of a commission on the sales effected by him for the plaintiff, was to have the whole proceeds of the sales less 2s. 6d. per lb., which was to be paid to the plaintiff. This was held not to give the broker such an interest in the goods sold by him as to render him an incompetent witness for the plaintiff, his principal, in an action for their price. This decision seems to have paved the way to others which went far beyond it. In *Dry v. Boswell* (s), Lord Ellenborough held that no *quasi*-partnership subsisted between the owner of a barge and the man who worked it, and who received for his wages half the gross earnings; and in *Mair v. Glennie* (t) where the captain of a ship was to be paid one-fifth of the profit or loss on an intended voyage, it was held that he and the owners of the ship were not *quasi*-partners. It had previously been decided in *Wilkinson v. Frazier* (u), that the crew of a whaling-ship who were to be paid by the owners a certain share of the oil brought home, were not partners with them.

The distinction between gross returns and profits (or, as they are sometimes called, gross profits and net profits), was acted upon by Mr. Baron Parke in *Heyhoe v. Burge* (x), when he told the jury "a person who shares gross profits is not a partner; but a person who shares net profits is *primâ facie* to be considered as a partner" (x).

Distinction between sharing profits, and payments varying with them.—Next, as to the distinction between payments out of profits as such, and payments not out of them as such. The great enforcer of the distinction in question was Lord Eldon, who seems to have been led to make it by the impossibility of otherwise reconciling *Grace v. Smith* and *Bloxham v. Pell*. In *Ex parte Hamper* (y) his Lordship is reported to have said:—

"It is clearly settled, though I regret it, that if a man stipulates that as the reward of his labour he shall not have a specific interest in the business, but a given sum of money even in proportion to a given quantum of the profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is as to third persons a partner, and in a question with third persons no stipulation can protect him from loss."

[*30] * Other cases decided by his Lordship contain dicta to the same effect (a), and the distinction must be considered as settled in point of law. The latest case upon this subject is *Pott v. Eyton* (b).

(r) 2 H. Blacks. 590. See, too, *Dixon v. Cooper*, 3 Wils. 40.

(s) 1 Camp. 330; and see *Wish v. Small*, in the note there.

(t) 4 M. & S. 240. The expression profit or loss, in this case, must have been held equivalent to gross returns.

(u) 4 Esp. 182. See *ante*, p. 19, note (x).

(x) *Heyhoe v. Burge*, 9 C. B. 431; see *ib.* 440, 444.

(y) 17 Ves. 412.

(a) See *Ex parte Rowlandson*, 1 Rose, 89; *Ex parte Langdale*, 18 Ves. 300; *Ex parte Watson*, 19 *ib.* 461.

(b) 3 C. B. 32. See further as to this case, *infra*, § 2 (2).

The defendant Eyton was concerned in a colliery, and the defendant Jones kept a shop for supplying the workmen at the colliery. Eyton built the shop; licenses to sell tea, &c., were taken in his name, and he paid for the goods supplied to the shop. Jones managed the shop business. Eyton received first seven and afterwards five per cent. on the amount of all sales to the workmen, and Jones had all the rest of the profits of the shop from whatever source derived. The question was whether Eyton and Jones were partners or *quasi*-partners. The jury found that there was no agreement to share profit and loss, and the Court of Common Pleas acted on the distinction taken in *Ex parte Hammer*, and on the distinction between profits and gross returns, and held that no partnership or *quasi*-partnership existed.

Loans. — A loan of money to be repaid with interest, however exorbitant, did not constitute a *quasi*-partnership between the borrower and the lender (*c*) unless profits were expressly pointed at as the fund for payment (*d*).

2. Modifications introduced by the House of Lords in *Cox v. Hickman*.

Such was the state of the law when the case of *Cox v. Hickman* came before the House of Lords; and that tribunal, in effect, decided that persons who share the profits of a business do not incur the liabilities of partners unless that business is carried on by themselves personally or by others as their real or ostensible agents (*e*).

The question in *Cox v. Hickman* (*f*) was substantially whether the scheduled creditors to a deed of arrangement, who were to be paid their debts out of the profits of their debtor's business, were liable to debts contracted by the * trustees in carrying on that business pursuant [*31] to the deed (*g*); and it was ultimately decided that they were not.¹

(*c*) *Grace v. Smith*, 2 Wm. Blacks. 998.

(*d*) *Gilpin v. Enderby*, 5 B. & A. 954; *Fereday v. Hordern*, Jac. 144; *Bloxam v. Pell*, *ante*, p. 27. See as to the two first cases, *ante*, p. 16.

(*e*) *Cox v. Hickman*, 8 H. L. C. 268.

(*f*) *Hickman v. Cox*, 18 C. B. 617, and 3 C. B. N. S. 523; *Cox v. Hickman*, 8 H. L. C. 268. See, also, *The Stanton Iron Co.*, 21 Beav. 164; *Price v. Groom*, 2 Ex. 542, and *ante*, p. 21. *Owen v. Body*, 5 A. & E. 28; and *Janes v. Whitbread*, 11 C. B. 406, may also be referred to on the

subject of partnership created by creditors' deeds; and as to the non-liability of inspectors for debts not contracted by them as principals, see *Redpath v. Wigg*, L. R. 1 Ex. 335; *Easterbrook v. Barker*, L. R. 6 C. P. 1.

(*g*) The defendants actually sued were two trustees, who were also scheduled creditors; one of them never acted as trustee, and the other had retired from the trusteeship before the debts in question were contracted. But all the judges agreed that there was no difference between the liability of the defendants and that of the other scheduled creditors.

¹ See *Davis v. Patrick*, 122 U. S. 138, 30 L. ed. 1090.

The Lords were unanimous in treating the matter before them as a mere question of agency, and in holding that the circumstances that the profits of the business were to be shared by the scheduled creditors was by no means sufficient to show that the trustees were their agents and authorised to act as such on their behalf (*h*).

Observations on the decision of the House of Lords.—In *Cox v. Hickman*, the persons whose liability was in question were only entitled to share profits to the amount of their respective debts, and this circumstance was greatly relied upon as distinguishing the case from *Waugh v. Carver*, and others of that class, in which the profits were shared to an indefinite extent. But it is plainly not consistent with the reasoning in *Cox v. Hickman* to hold that the mere fact that profits are shared indefinitely, raises an irrebuttable presumption that those who share them are the principals of those who make them. The circumstance that one person shares all the profits made by another, is no doubt an important element to be considered in determining the true relation in which those persons stand to each other; but it no more conclusively shows such relation to be one of agency, than it conclusively shows that the persons in question are truly partners *inter se*. In fact, although the House of Lords in deciding *Cox v. Hickman*, professed to overrule no previous authority, the effect of that decision has unquestionably been to put a great branch of partnership law on a substantially new footing. The following more recent decisions conclusively show this.

More recent decisions.—In *Kilshaw v. Jukes* (*i*) it was held that a person who advanced money and supplied goods to two others on the terms of being repaid the advances and price of the goods out of the profits of a building speculation, if such profits should be sufficient for the purpose, was not liable to debts contracted by them for the purposes of the speculation.

[*32] * In *The English and Irish Church and University Insurance Society* (*k*) it was held that the holders of policies of insurance who were entitled to be paid out of the funds of an insurance society not only the sums orig-

(*h*) Baron Bramwell had taken the same ground. See 3 C. B. N. S. 552.

(*i*) 3 Best & Sm. 847.

(*k*) 1 Hem. & M. 85. Compare *Re Albion Life Assur. Soc.*, 16 Ch. D. 83.

inally insured but also such bonuses as by the rules of the society might be added thereto out of the profits of the society, were not liable as partners with the members of the society either to the holders of other policies issued by it, or to its other creditors.

In *Bullen v. Sharp* (*l*), the whole profits of a son's business were assigned over to his father and another person upon trust, first to pay the father 500*l.* a year, to be increased to a sum equal to one-fourth of the profits when one-fourth thereof amounted to more than 500*l.* a year; secondly, to pay an annuity to the son; thirdly, to form a reserve fund for the benefit of the son; and fourthly, to pay the residue of the profits to the son. The Court of Common Pleas held the father liable for the engagements of the son upon the ground that the profits having been assigned to him, he had a direct interest in the business. On appeal, however, this decision was reversed, on the ground that the business was really the son's, and that the father's interest in it was not such as to render the son his agent for carrying it on.

In *Shaw v. Galt* (*m*), it was held that a clerk, entitled to a fixed salary, and in addition thereto to one-third of the net profits of the business of his employers, was not liable to their creditors. The salary and share of profits were only intended as a remuneration for his services, and the profits were to be ascertained from balance-sheets prepared by the employers upon the principle theretofore adopted by them.

In *Holme v. Hammond* (*n*), five persons agreed to become partners for seven years, and to share profits and losses equally, and they further agreed that if any partner died within the seven years, the survivors should continue the business and pay to the executors of the deceased partner the same share of profits which he would have had if living. One of the partners died; he had no capital in the firm, but on his * death the firm was indebted to him [*33] in respect of undrawn profits and other matters. After his death the business was carried on by the survivors; his executors took no part in the management of the business, but they claimed one-fifth of the profits made since his death,

(*l*) L. R. 1 C. P. 86, reversing 18 C. B. N. S. 614.

(*m*) 16 Ir. Com. Law Rep. 357.

(*n*) L. R. 7 Ex. 218.

and they were furnished with accounts in which they were credited with such profits. The plaintiff sued the executors in respect of a contract made by the surviving partners after the death of the deceased partner, but it was held that the executors were not liable; for the surviving partners were not their agents, and although the case did not fall within the provisions of 28 & 29 Vict. c. 86, it was governed by the principles laid down in *Cox v. Hickman*.

Again, in *Mollwo, March, & Co. v. Court of Wards (o)*, a person advanced large sums of money to merchants, and took as a security a charge on their business, with extensive powers of control, and stipulated for a large commission on their profits whilst anything remained due to him and for payment of his principal and twelve per cent. interest. The lender had not, in fact, taken any profits, and the above arrangement was afterwards varied by his taking a mortgage for his principal and interest. He was held not liable for debts contracted by them whilst the above agreement was in force. The Court held that the transaction was really a loan. It was urged in vain that even if there was no partnership the debtors were the agents of the creditor to earn the principal, interest, and commission to which he was entitled. But this contention very properly failed; there being no more reason for inferring agency than partnership from an agreement to share profits.

Observations on these cases.—There can be no doubt that in all these cases the decisions would have been the other way had they occurred before *Cox v. Hickman*; and they are particularly valuable as showing that the principles on which that case was decided by the House of Lords may now be safely relied upon, in opposition to the old rule which, before that important decision, was considered too firmly settled to be questioned. In fact, the strong tendency of the above [*34] decisions is to establish the doctrine that no *person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*, or unless they are his agents (*p*); and, in the author's opinion, this is now the law (*q*). At the same time, persons may find that they

(o) L. R. 4 P. C. 419. Compare *Pooley v. Driver*, 5 Ch. Div. 458, noticed *infra*, p. 38.

(p) As in *Steel v. Lester*, 3 C. P. D. 121.

(q) See Baron Bramwell's judg-

are partners for all purposes, although they only intended to be so for purposes beneficial to themselves (*r*).

For the guidance, however, of those who may think that the writer has gone too far in representing the old law as completely superseded, the following more limited propositions are submitted as at least conclusively established, and as applicable even in cases not within 28 & 29 Vict. c. 86.

Effect of Cox v. Hickman.—1. That persons who share the profits of a business are, like other persons, only liable for the acts of themselves and of their real or ostensible agents.

2. That whether in any particular case the relation of principal and agent does or does not exist between one person who carries on a business and another person who shares its profits, depends not upon the mere fact that the business is carried on, more or less, for the benefit of the latter, but upon all the circumstances of the case.

3. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to share the gross returns of a business or adventure conducted by another.

4. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to be paid definite sums out of the profits made by another.

5. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to be paid sums varying with the profits made by another.

6. That the relation of principal and agent is not constituted merely by the existence of a trust, entitling one person to profits made by another.

*7. That *primâ facie* the relation of principal and agent is constituted by an agreement entitling one person to share the profits made by another to an indefinite extent: but that this inference is displaced if it appears from the whole agreement that no partnership or agency was really intended.¹

8. That in these as in all other cases the courts will be apt to defeat fraud, and to hold partnerships to be created

ment in *Bullen v. Sharp*, L. R. 1 C. P. 86; *Holme v. Hammond*, L. R. 7 Ex. 218; *Mollwo, March, & Co. v. Court of Wards*, L. R. 4 P. C. 419. See also *Ex parte Tennant*, 6 Ch. D. 303. See p. 38, note (*d*). (*r*) See *Pooley v. Driver*, 5 Ch. D. 458, noticed *infra*, p. 38.

¹ *London Ass. Co. v. Drennen*, 116 U. S. 461, 29 L. ed. 688.

if they are intended, although the intention may be carefully concealed.

The 1st, 2d, 4th, and 6th of these rules appear to be warranted by *Cox v. Hickman* and *Mollwo, March, & Co. v. Court of Wards*: the 3d and 5th by older authorities, not touched by those decisions; the 7th is probably the most correct mode of expressing the effect of *Cox v. Hickman* and *Mollwo, March, & Co. v. Court of Wards* on *Waugh v. Carver*, and other cases of that class; the 8th speaks for itself, and is illustrated by *Pooley v. Driver* and *Ex Parte Delhasse*, which will be noticed presently.

3. *The act of 28 & 29 Vict. c. 86.*

In order to amend the law by which persons sharing profits were held liable to losses, the act of 28 & 29 Vict. c. 86 was passed. This act (commonly called Bovill's act) is entitled "An Act to amend the law of Partnership." It received the Royal assent on the 5th of July, 1865, and enacts as follows:—

1. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, *of itself*, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.

2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking, shall, *of itself*, render such servant or agent responsible as a partner therein, nor give him the rights of a partner (s).

[*36] *3. No person being the widow or child of the deceased partner of the trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, *by reason only of such receipt*, be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

4. No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, *by reason only of such receipt*, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business.

(s) Quære if this deprives him of a right to an account? See *Harrington v. Churchward*, 6 Jur. N. S. 576. The object of the act was not to

deprive the servant of his rights against his master, but to protect each from liability to third parties by reason of the acts of the other.

5. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied (*t*).

6. **Interpretation of "person."**—In the construction of this act the word "person" shall include a partnership firm, a joint-stock company, and a corporation.

Upon the foregoing enactment it is to be observed —

1. **Effect of the statute.**—That it applies to an extremely limited number of cases, and leaves wholly untouched a large number of agreements of common occurrence, *e.g.*, all such as had to be dealt with in *Waugh v. Carver*, *Smith v. Watson*, *Cheap v. Cramond*, and *Cox v. Hickman*. All such cases, however, must now be dealt with on the principles laid down by the House of Lords in the last-named case (*u*).

2. That it in no way modifies the doctrine by which persons who hold themselves out as partners incur the liabilities of partners.

3. That to entitle a person lending money to the benefit of the act, there must be a contract in writing; and it seems that such contract must be signed (*x*).

4. That in the case of servants, agents, widows, and children, *and of persons selling a goodwill, [*37] there is no necessity for any contract in writing.

5. That unless a retiring partner is brought within the 1st, 2d, or 3d section, he is in no better position than other persons.

6. That the persons within the 2d and 3d sections are not within the 5th.

7. That persons who lend money or sell a goodwill in consideration of a share of profits cannot, in respect of such

(*t*) See *Ex parte Mills*, 8 Ch. 569, and *Re Stone*, 33 Ch. D. 541. But a secured creditor can sell or foreclose, as the case may be, even to the prejudice of other creditors. *Badeley v. Consolidated Bank*, 34 Ch. D. 436, *infra*, p. 38.

(*u*) See *Holme v. Hammond*, L. R. 7 Ex. 218; *Mollwo, March, & Co. v. Court of Wards*, L. R. 4 P. C. 419.

(*x*) *Pooley v. Driver*, 5 Ch. D. 458, where, however, there was only a draft contract.

loan or profits, compete with any other creditors upon a distribution of their debtors' assets (*y*).

8. That the 3d section only applies to widows and children of deceased partners of traders: *i.e.*, it is presumed, of persons formerly liable to be adjudicated bankrupt as traders.

9. That the 5th section does not deprive the lender of his right to retain any security he may take for his money (*z*): nor to foreclose such security (*a*).

10. That the act may be made an instrument of fraud, if a person is allowed to lend to the same person a small sum in consideration of a large share of profits, and a large sum in consideration of fixed interest. In such a case if a fraud were intended it would probably be defeated by holding the lender liable as a partner, or at least by holding him to be within the 5th section as to both loans. But where there is no fraud, a person who has advanced money under the act, and has also *bonâ fide* made other advances not under it, can on the bankruptcy of the borrower prove for the latter advances, although not for the former (*b*). A person, however, who lends money on the terms of sharing profits and then agrees to take a fixed rate of interest instead of them, is within the 5th section of the act and cannot prove in competition with other creditors (*c*).

11. That it is apparent from the words "*of itself*" and "*by reason only*" in the first four sections of the statute that it was not intended to relieve persons who are really partners (although dormant) from the liabilities incident to that position.

[*38] * **Cases not within the act.** — Agreements intended to secure the benefit of the act to lenders of money are constantly framed with all sorts of clauses which expose them to the risks they are so anxious to avoid.

In *Badeley v. Consolidated Bank* (*d*), a lender of money

(*y*) *Ex parte* Taylor, 12 Ch. D. 366; *Ex parte* Corbridge, 4 Ch. D. 246.

(*z*) *Ex parte* Sheil, 4 Ch. D. 789.

(*a*) *Badeley v. Consolidated Bank*, 34 Ch. D. 536; *infra*, p. 38.

(*b*) See *Ex parte* Mills, 8 Ch. 569.

(*c*) *Re* Stone, 33 Ch. D. 541.

(*d*) 34 Ch. D. 536. Reversed on appeal (9th Feb. 1888) W. N.

1888, p. 30, so far as the court below decided that the lender was liable for the debts of the borrower. The advances were made to enable the borrower, a railway contractor, to perform a contract to make a railway; the advances were to be employed for this purpose; the benefit of the contract and the borrower's plant, &c., were assigned to the lender

to a railway contractor on the security of his plant, and on the terms of receiving interest and a share of his profits, was held to be liable to his debts; the formal contract between the parties being in truth a device to conceal the fact that they were really partners.

In *Ex parte Delhasse* (*e*) it was held that a loan to a firm on the security of the business of the borrowers and to be repaid out of it, coupled with a power to dissolve their partnership, was not within the act.

In *Syers v. Syers* (*f*) the plaintiff lent the defendants money on the terms that they should execute a deed of partnership giving the plaintiff a share of the profits in the business of the defendants to be drawn up under the statute in question; and it was held that this agreement constituted the parties to it partners in the business.

In *Pooley v. Driver* (*g*) a carefully drawn agreement intended to secure to the lender the benefit of the statute signally failed to do so. In that case A. and B. entered into partnership for fourteen years with a capital of 30,000*l.* of which 10,000*l.* was to be raised by way of loan under the

as a security for the loan; and the lender was empowered to take possession of the plant, &c., and himself to complete the contract if necessary. The borrower agreed to repay the advances with interest at the end of six months after they were made, and there was a proviso for redemption on such repayment. The borrower also agreed to pay the lender a share of the profits arising from the contract with the railway company when that contract should be completed, and it was stipulated that in ascertaining those profits the borrower should be allowed certain sums for himself. There was a mass of correspondence relied upon for the purpose of showing that the borrower and lender were really partners, and Mr. Justice Stirling decided that the correspondence showed that this really was the case. The Court of Appeal differed from him on this point, and held that the correspondence was consistent with the formal security, and that the contract between the parties was really what it purported to be, viz., a contract of loan upon

security. The Court of Appeal decided that, although the case was not within § 1 of Bovill's Act, it came within the principles laid down in *Cox v. Hickman and Mollwo, March, & Co. v. Court of Wards*. The statement in the text on p. 34, lines 1 to 7, may, it is apprehended, be now safely relied upon. The Court of Appeal confirmed the decision in *Badeley v. Consolidated Bank* on the construction put on § 5 of Bovill's Act: see p. 36, note (*t*), and p. 37, note (*a*).

Compare the last case with *Frowde v. Williams*, 56 L. J., Q. B. 62, in which a would-be lender was held to be a partner with the borrower.

(*e*) 7 Ch. D. 511.

(*f*) 1 App. Ca. 174.

(*g*) 5 Ch. D. 458. Compare this with *Mollwo, March, & Co. v. Court of Wards*, L. R. 4 P. C. 419, noticed *ante*, p. 33, and with *Ex parte Tenant*, 6 Ch. D. 303, where a father claimed to be a partner with his son contrary to the true meaning of an agreement framed to avoid a partnership.

above act. The capital was to be divided into 60 shares of 500*l.* each, of which 20 were to belong to the persons advancing the 10,000*l.* in proportion to their advances. The net profits were to be also divided into 60 shares, of which 20 were to belong to the same persons in the same proportion. At the end of the partnership an account was to be taken in the usual way: the moneys advanced were to be returned; but if it appeared that the persons advancing the 10,000*l.*

had received more than their shares of profits, the [*39] excess was to be refunded, but not *to an amount exceeding their advances. C. advanced 2,500*l.* to A. and B. on the terms of an agreement, which incorporated the agreement between A. and B.; which provided for the employment of the capital (including C.'s advances) in the business, gave C. liberty to inspect and take copies of the partnership books, entitled him to five-sixtieths of the estimated annual profits of the business; and provided for a final account and repayment at the end of the partnership of the 2,500*l.*, unless it should appear that he had received more than his share of profits, in which case he was to refund the excess, not exceeding his 2,500*l.*

There was also a clause empowering A. and B. to pay out the 2,500*l.* in the event of C.'s bankruptcy, or of any dispute between the parties, and an arbitration clause. This agreement with C. was drawn up in writing, but remained in draft, and was never signed. But D. also advanced money on the same terms, embodied in a written agreement duly signed by him and A. and B. It was held by Jessel, M.R.: 1. That the unsigned draft agreement with C. was not a sufficient writing to bring the case within the statute; 2. That the signed agreement with D. did not entitle him to the protection of the statute; and 3. that, notwithstanding *Cox v. Hickman*, and that class of cases (*ante*, p. 30), both C. and D. were dormant partners, and liable as such for the debts of A. and B. The judgment in this case is very important, and well deserves attentive study. It proceeded upon the ground that partnership is *primâ facie* the result of participation in profits; and that the true result of the whole arrangement was that the advances were not real loans, but were in truth contributions of capital under colour of loans.

Observations on Pooley v. Driver.—One of the most remarkable features of this case was that, when the time

arrived for the repayment of the advances it might be found that not only was there nothing to repay, but that the so-called lenders might have to refund part of what they had already received, even to the extent of their so-called loans (*h*). This practically amounted to a possible loss of their advances, and distinguished the case at once from a true *contract of loan; for in such a contract [*40] the money lent is to be repaid intact, and the only risk run is the insolvency of the borrower (*i*).

2. *By holding one's self out as a partner.*¹

Persons who hold themselves out as partners, incur the liabilities of partners.

The other mode in which a person not a partner becomes liable as if he were one, is by so conducting himself as to

(*h*) See the clauses, 5 Ch. D. 463, 466, and the comment on them at p. 492. (*i*) See *ante*, p. 16.

¹ One who is not a partner, and who has no interest in a partnership, cannot, by reason of having held himself out to the world as a partner, be held liable as such on a contract made by the partnership with one who had no knowledge of the holding out. *Thompson v. First Nat. Bank of Toledo*, 111 U. S. 530.

In *Central City Savings Bank v. Walker*, 66 N. Y. 424; s. c. 5 Hun, 34, it was sought to charge the defendants as makers of a promissory note under the name of a corporation whose charter had expired, and of which defendants were stockholders. Defendants had received dividends after the expiration of the charter. It was held that the legal title vested in the trustees in office at the expiration of the charter, in trust for the creditors and stockholders, and that receiving a part of the earnings did not make a stockholder liable for the act of the agent of the supposed corporation in contracting debts, and that where neither a trustee or simple stockholder contracted or authorized the debt there was no distinction in respect to their liability.

An advertisement published in a newspaper by A. and B., partners as A. & Co., "Notice! C. has an interest in our establishment from the 1st instant. We trust with his additional aid, etc., we shall be able to offer further inducements in our business. A. & Co.," is not *in itself* sufficient to bind C. as to any one who may have dealt with the firm after seeing the advertisement. It affords no proof that C. is a member of the firm even if the language necessarily implies a participation in profits and, if it were a holding out, a creditor of A. & Co. could not recover against C. without proof that prior to giving the credit, he, the creditor, was apprised of it. *Vinson v. Beveridge*, 3 MacArthur, 597; s. c. 36 Am. Rep. 113.

R. and S. had been for years bookkeeper and superintendent respectively of the firm of D. S. B. & Co. T., one of the partners, bought out the interest of the other partner in accordance with arrangements made some time before and discussed with R. and S. in connection with their remaining and the terms

lead other people to suppose that he is willing to be regarded by them as if he were a partner in point of fact. The prin-

on which they were to do so. He then handed to R. a paper stating the dissolution of the old firm and his purchase, and that "I will continue the business under the firm of H. D. T. & Co., admitting R. and S. to interests from this date"; and directed R. to make a copy of it and publish it, which R. did on the following day. About same time T. and R. and S. signed and sealed in triplicate a paper which stated an employment of R. and S. at an annual salary with a contingent interest of a percentage in the net proceeds of the business above a certain amount. R. acted as bookkeeper and correspondent, signing firm name to letters without using "per" or "by," so signing and endorsing checks for deposit only by express direction of T., given not in each instance, but at the commencement of the business as a general direction applicable to all cases. T. alone signed checks, notes, bills, or acceptances. S. acted as superintendent of the mills and signed H. D. T. & Co. without "per" or "by" to wagoners' receipts when goods were delivered at the mills. Neither R. nor S. contributed any money or merchandise to the business.

Held, that R. and S. were not partners of T. and could prove for their wages against his estate in insolvency. Appeal of Scull, 115 Penn. St. 141 (1886); York Co. Bank's Appeal (32 Penn.), 8 Casey, 446.

Where B. was the active manager of the partnership, in which capacity he bought goods from the plaintiffs, and repeatedly signed the partnership name to notes without adding anything to indicate that he did so as agent, and never told the plaintiffs he was not a partner, and all his letters and correspondence was signed in the partnership name, and nowhere in his transactions with the plaintiffs was there anything from him indicating that he was an agent, and he had signed notes in the body of which his name was inserted by the plaintiff's agent as a partner; but as he claimed in error and without noticing the recital of his name therein, held that plaintiff should recover on the notes which were signed by B. in the name of the partnership "in liquidation" after its dissolution and without authority, B.'s wife being a member of the partnership. *Dodd v. Bishop*, 30 La. Ann. 1178 (1878).

Those of the surviving members of a commercial partnership who continue the business become thereby partners as to the world. Those who do not are not bound *in solido* with those who do; but in case of a partnership in a steamer the two part owners who continued to run her after the death of one and in opposition to the wishes of a third, bound the latter by so doing. *Cooper v. Burns*, 6 La. Ann. 739.

An instruction that if the jury believed from the evidence that H. and D. did not formally enter into copartnership for the purpose of dealing in hogs, but D. so acted as to lead the plaintiff reasonably to believe that he was a member of the firm, by allowing his name to be used in connection with that of H. in buying, and by permitting the firm name of H. & D. to be signed to papers used in the business, and by declarations in the presence of the plaintiff so that the plaintiff reasonably believed that D. was a member of the firm of H. & D.; and so believing sold and delivered his hogs to H. & D., said D. not being present when the hogs were delivered—then they might find for the plaintiff—was held proper. *Dailey v. Coons*, 64 Indiana, 545.

The plaintiffs having sold goods to Secor, Swann, & Co. are not obliged to show that they knew or thought that the "Secor" meant the defendant; but if the defendant, Charles F. Secor, received a valuable consideration for permitting the name of Secor to be used in the firm name, although he had no interest in the business, he is liable for the debt a partner. *Poillon v. Secor*, 61 N. Y. 456.

ciple of this is obvious and satisfactory, and is well laid down by C. J. Eyre, in the great case of *Waugh v. Carver* (*k*). His Lordship there said:—

“Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners, that A. is to contribute neither labour nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes as against all the

(*k*) *Waugh v. Carver*, 2 H. Blacks. 235. See *Scarf v. Jardine*, 7 App. Ca. 345, now the leading case on this subject. The principle will be found

stated to the same effect in *Ex parte Watson*, 19 Ves. 461; *Ex parte Matthews*, 3 V. & B. 125; *De Berkum v. Smith*, 1 Esp. 29.

The main foundation of the plaintiffs' case was a letter from C. to them, dated Sept. 23, 1871, saying: “M. has commenced a small business in his line of confectioneries, fruits, etc. I have taken an interest with him to help him to start. He is every way worthy; just asked me to introduce him to some house in S. in your line. I suggested that he would do as well with you or Walker. If you have them, send him a barrel of nice apples, one or two hundred oranges, the same bananas. Ship to J. R. M. & Co. I will see that the bills are paid promptly.”

The bills sued were for goods sent on the faith of this letter. There was evidence of admissions by C. in 1873 of a partnership up to June, 1872. C. denied partnership, and there was a conflict of testimony as to whether notice had been given plaintiff by C.'s direction in October, 1872, that he would not be liable for any goods sold to M. The verdict for plaintiff was not disturbed. *Carmichael v. Greer*, 55 Ga. 116.

Before attempting to purchase of the plaintiff, B., an agent of the U. S. Reflector Co., a corporation, told H., one of the defendants and a member of the firm of H. N. & G., that no one would trust the corporation; to which H. replied, “You must tell everybody the same as I have told you: we are the Reflector Company,” and authorized B. to say the corporation was “now in good condition,” and that H. N. & G. were its backers. Plaintiff declined to sell upon these representations, and then B. by authority of H. promised that H. N. & G. would pay the bill, and therefore the sale was made to the corporation and the goods delivered to it, charged to it and sent to it for payment.

Many letters of H. to B. showed a continued interference by the firm of H. N. & G. in the management and business of the Reflector Company, but which was natural and proper under a written agreement between the firm and the company which contemplated an effort to restore the company's prosperity and business. It appeared that plaintiff was not misled by the suggestion of a partnership.

Held, that plaintiff could not recover in an action for goods sold and delivered against H. N. & G., or either of them. *McLewee v. Hall*, 103 N. Y. 639. See also *Cassidy v. Hall*, 97 N. Y. 159.

A person who, not being a partner in fact, suffers himself to be held out to the public as a partner thereby renders himself liable as a partner, but only to persons who in ignorance of the real facts have been misled or injured by contracting on the faith of his conduct. *Marble v. Lypes*, 82 Ala. 322 (1886).

C. and B. were in partnership as butchers, and F. arranged to “butcher with them,” “to help butcher and sell meat and account for what meat he took,” and they agreed what places each was to sell at; C. bought cattle of plaintiff, and told plaintiff the three were in company, and that the purchase

rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds

was for the company, and each of the defendants participated to some extent in the taking and delivery of the cattle. Defendants all worked together in same building, and on same cattle, and always bought cattle together, and represented that they were in company.

Held, a holding out on the part of F. *Matthews v. Felch*, 25 Vt. 536.

Some of the circumstances and evidence reported tended to show that the defendants were not in partnership; still the auditor finds that they occupied the same store, selling groceries and liquors, and held themselves out as partners. This finding fixes the fact of partnership. If individuals hold themselves out to the world as joint traders, they will be held responsible as partners to third persons, whatever may be the real nature of their connection, or the agreement under which they act. *Smith v. Smith*, 27 N. H. 244.

The petition alleged both that the defendants were partners, and also that they held themselves out as such, and the charge to the jury that unless they believed that an actual partnership existed between the defendants, they would find for the defendant C. (to whom none of the goods had been charged), omitting and refusing to charge to the effect that they should find against both defendants should they believe that defendants held themselves out to third persons as partners, was clearly erroneous if there was evidence sufficient to show *prima facie* any declarations or conduct on the part of C., or on the part of S., with C.'s knowledge, that should reasonably have induced appellants to consider them as partners in the business which S. was conducting. *Harris v. Crary*, 67 Texas, 383 (1887).

Suppose B. is in fact a clerk of A., yet A. permits him to represent himself as a member of the firm of A. & B. and to contract debts with C. upon the credit of the supposed firm. As against C., A. cannot dispute the existence of the firm or deny his liability for the debts. But A.'s estoppel would not affect any one but himself. D., an antecedent creditor of A., is not estopped to deny the partnership, and as to him C. would have no preference. *Grabenheimer v. Rindskoff*, 64 Tex. 49 (1885).

In an action against A., B., and C. as members of C. & Co., it appears that B. C. & X. constituted the firm, and that A. had, to the knowledge of B., but not to the knowledge of C., held himself out as a partner, and it was decided that a verdict against A., B., and C. was good. *Cameron v. Cameron*, 3 Manitoba, 308.

Plaintiff sued on notes given in renewal and signed by J. A. T. in the partnership name of E. C. T. & Sons, and proved that on one occasion J. A. T. said to him, "We have built up a fine trade"; "we will have to pack our goods this fall in order to save our trade." J. A. T. was a son of E. C. T., but was not in the firm and was only a confidential clerk. E. C. T. had told J. A. T. that when he sold his coal lands he would have a large surplus, and would then take J. A. T. into partnership. E. C. T. was for a long time ill, and on his recovery often absent, and J. A. T. was then left in charge of the business, and was for convenience authorized by E. C. T. to sign the name of E. C. T. & Sons. The original transaction was a sale of peaches by E. C. T., and a repurchase of them by him, when he made and gave the original notes, and plaintiff then dealt with him alone, and no inquiries were made as to who constituted the firm of E. C. T. & Sons. Held, that plaintiff could recover, and that the question of holding out was a question of fact for the jury. *Thomas v. Green*, 30 Md. 1.

II. and two others entered into a written contract by which he was to loan them \$10,000 for banking purposes, and not to participate in the profit or loss, but to have interest on the loan; but the evidence strongly tended to show that he held himself out as a partner, acted as president of the bank,

to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons. when, in

and took part in most of its business transactions. Held, that the written contract did not constitute a partnership, but should it be made to appear that any of the debts of the bank contracted before H's death were created under such circumstances as to hold him as a partner to third persons, then the share coming to the administrator out of the assets assigned to appellees ought to be subjected, as far as need be, to the payment of the balance due such creditors after receiving their *pro rata* dividends. *Newlin v. Bailey*, 15 Bradw. 199 (Ill. App.).

If a person suffer his name to be used in a business or otherwise hold himself out as a partner, he is to be so considered, whatever may be the agreement between him and the other partners. *Stearns v. Haven*, 14 Vermont, 540; *Fisher v. Bowles*, 20 Ill. 396.

Where L. participated in the negotiations for the sale of sheep, and so talked and acted in connection with their sale as to lead the plaintiffs, as reasonable men, to believe he was a partner in the sheep, and the plaintiffs so understood it, and he did not correct the impression, he is estopped from now denying it as against the plaintiffs. *Sherrod v. Langdon*, 21 Iowa, 518.

F., simply intending to aid his nephew B., who could not obtain a license in his own name, furnished the means for carrying on the business, had the goods bought in B.'s name, and the bills, when sold, generally made out in F.'s name, the license being taken out in F.'s name, and the business conducted in same name. Held liable to third persons as a partner. *Grief v. Boudousquie*, 18 La. Ann. 631.

An instruction that it was not necessary to entitle the plaintiffs to recover, to prove that the defendants were partners or jointly interested in the mill, but if their acts and conduct was such as to induce the plaintiffs to believe them to be partners or jointly interested and under that impression and belief so created, the work was done and the materials furnished, both were liable to the plaintiffs therefor, although Peter Brugman was not, and Philip E. Brugman was, alone interested in having the work done and materials furnished, and the same was for his sole use and benefit, is entirely unobjectionable. *Brugman v. McGuire*, 32 Ark. 733.

One who knowingly permits his name to be used as a member of a trading firm under such circumstances as to mislead a stranger who deals with the firm on the faith that he is a partner, is liable as such. *Campbell v. Hastings*, 29 Ark. 512.

C. became a partner of R. after a purchase by R. of a lot of tobacco which, however, was not *delivered* to R. until he had shown the seller the articles of partnership. Then R. and C. became partners, and the tobacco became part of the partnership stock. Held, that the sale was made to R. on his individual credit, and that C. was not liable to the seller whose bill was dismissed. *Craig v. Alverson*, 6 J. J. Marsh. 609 (Ky.).

A. and T. ran a line of stage-coaches from Barre through Holden to Worcester and back. A. furnished, maintained, and owned the horses and coaches used between Holden and Worcester, and received to his own use all the money paid for transportation between Holden and Worcester, and T. did the like from Holden to Barre. They hired one man to drive through for a certain sum per month and "the perquisites," and he absconded with money delivered to him by the plaintiff at Barre to be carried to Worcester. Held that A. and T. were jointly liable for the money. *Cobb v. Abbot*, 14 Pick. 289; *Dwight v. Brewster*, 1 Pick. 50.

Defendant furnished team and equipments, and took care of them. M. drove team, gathered passengers, and collected fares, which he and defendant

fact, they lent it only to two of them, to whom without the others they would have lent nothing."

divided. Held a partnership as to third persons, and defendant liable for M.'s negligence injuring plaintiff. *Stroher v. Elting*, 97 N. Y. 102; s. c. 49 Am. Rep. 515.

The defendants, as freighters on the Delaware River, had done business and given receipts as "A. M. & Son," "A. M. & Sons," and "A. & T. M." T. M. was proved to have given such receipts and to have spoken of the business in terms that implied he was jointly interested with his father, and he kept the accounts and took a leading part in the business connected with the boats. Held liable for a loss of goods delivered to their charge, which occurred on a vessel owned only by one of them, while T. M. was only accidentally in charge of her as captain on the trip when the loss occurred. *Mershon v. Hobensack*, 22 N. J. L. 372.

The ordinary arrangement between several connecting transportation lines, by which each pays what is due for freight on the goods to the point where it receives them, and the last collects the whole bill of consignee—the accounts being between the carriers being settled periodically, and each stipulating to charge only certain rates over its own line—does not create a partnership or joint liability. *Darling v. Boston & Worcester R. R.*, 11 Allen, 295.

As to declarations and admissions to prove partnership, see note to *Teller v. Patten*, 15 U. S. L. ed. 831.

Not partners by indorsing firm notes. *Hunt v. Oliver*, 118 U. S. 211. See *Sun Mutual Ins. Co. v. Kountz Line*, 122 U. S. 583, 30 L. ed. 1137.

Whatever may have been the private understanding between the owners of the respective boats composing the Barnett Line of Steamers as between themselves, in relation to the freights carried by the respective boats, could not affect the rights of third persons contracting with them in the name of the firm which was ostensibly running that line of steamers and receiving freights as the Barnett Line of Steamers. The law will imply a partnership engagement when parties hold themselves out to the world as doing a particular business in a firm name as to third persons who contract with them in that firm name, whatever may be the real nature of their connection as between themselves. *Barnett Line of Steamers v. Blackmar*, 53 Ga. 98.

Members of the "Nebraska State Grange of the Patrons of Husbandry," composed of delegates elected from the subordinate "Granges," are not partners as to members of such subordinate granges, and so liable to an individual member of the latter for a breach of warranty in a sale of a Werner Harvester by one who was "State Agent of the Patrons of Husbandry," and appointed by the State Grange. *Edgerly v. Gardner*, 9 Neb. 130.

A member of an unincorporated joint-stock company, who with the company's assent lends money from the joint fund to another member, and takes his note therefor running to himself, can recover on the note. *Comer v. Thompson*, 4 Ont. K. & Q. B. 256 (Old Series).

See also *White v. Whaley*, 1 Tex. App. Civ. § 101; *Lewis v. Wade*, 1 Tex. App. Civ. § 697; *Hinman v. Littell*, 23 Mich. 484; *Moss v. Jerome*, 10 Bosw. 220; *Copley v. Lawhead*, 11 La. Ann. 615; *Tams v. Hittner*, 9 Penn. St. 441; *Irvin v. Conklin*, 36 Barb. 64; *Burns v. Rowland*, 40 Barb. 368; *Burbank v. Haas*, 9 La. Ann. 528; *Coward v. Pulley*, 11 La. Ann. 1; *Rogers v. Nichols*, 20 Tex. 719; *Benson v. McBee*, 2 McMull. 91; *Barrett v. Swann*, 17 Me. 180; *Mears v. James*, 2 Nev. 342; *Felichy v. Hamilton*, 1 Wash. C. C. 491; *Beall v. Lowndes*, 4 S. C. 258; *Cook v. Carpenter*, 34 Vt. 121; *Smith v. Hill*, 45 Vt. 90; *Getchell v. Foster*, 106 Mass. 42; *Noblit v. Bonaffon*, 81 Penn. St. 15; *Smith v. Smith*, 27 N. H. 244; *Hunn v. McKee*, 4 Ired. L. 475; *Ganzer v. Fricke*, 57 Penn. St. 316; *Crook v. Davis*, 28 Mo. 94; *Glenn v. Gill*, 2 Md. 1; *Wood v. Pennell*, 51 Me. 52; *McCarthy v. Nash*, 14 Minn. 127; *Lycoming Ins. Co. v. Barringer*, 73 Ill.

The doctrine that a person holding himself out as a partner and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct (*l*). It is therefore wholly immaterial whether the person holding himself out as a partner, does or does not share the profits or losses (*m*).

Effect of knowledge that a person who holds himself out as a partner is not a partner.— Nay more, even if it *be known that he does not share either, still he may [*41] be liable. For although a person who lends his name may stipulate for an indemnity from those who use it, it by no means follows that he ought not to be liable to third parties merely because they are aware of such stipulation. His name does not induce credit the less on account of his right

(*l*) As to which, see *Picard v. Sears*, 6 A. & E. 469; *Freeman v. Cooke*, 2 Ex. 654; *Carr v. L. & N.W. Rail. Co.*, L. R. 10 C. P. 316.

(*m*) *Ex parte Watson*, 19 Ves. 461. See also *Kirkwood v. Cheetham*, 2

Fos. & Fin. 798, where A. was B.'s agent, and A. held himself out as B.'s partner; both A. and B. were decided to be liable for goods supplied to A. for B. Compare *Hardman v. Booth*, 1 Hurl. & Colt. 803.

230; *Wynman v. Chicago & Alton R.R. Co.*, 4 Mo. App. 35; *Dwight v. Brewster*, 1 Pick. 50; *Cobb v. Abbot*, 14 Pick. 289; *Champion v. Bostwick*, 18 Wend. 175; *Fay v. Davidson*, 13 Minn. 523; *Ellsworth v. Tartt*, 26 Ala. 733; *Briggs v. Vanderbilt*, 19 Barb. 222; *Darling v. Boston & C. R.R.*, 11 Allen, 295; *Merrick v. Gordon*, 20 N. Y. 93; *Mohawk R. R. Co. v. Niles*, 3 Hill, 162 (N. Y.); *Edgerly v. Gardner*, 1 N. W. Rep. N. S. 1004; s. c. 9 Neb. 130; *Gales v. Watson*, 54 Mo. 585 (1874); *Rimel v. Hayes*, 83 Mo. 200 (1884); *Maxwell v. Gibbs*, 32 Iowa, 32; *Peck v. Lusk*, 38 Iowa, 93; *Brown v. Rains*, 53 Iowa, 81; *Buckingham v. Burgess*, 3 McLean, 364, 549; *Benedict v. Davis*, 2 Id. 347; *Bowie v. Maddox*, 29 Ga. 285; *Gumbel v. Abrams*, 20 La. Ann. 568; *Crozier v. Kirker*, 4 Tex. 252; *Rice v. Barrett*, 116 Mass. 312; *Cottrill v. Vanduzen*, 22 Vt. 511; *Hicks v. Cram*, 17 Vt. 449; *Walrath v. Viley*, 2 Bush. 478 (Ky.); *Markham's Exr. v. Jones*, 7 B. Mon. 456 (Ky.); *Kritzer v. Sweet*, 24 N. W. Reporter, 764 (Mich. 1885); *Smith v. Gerow*, 2 Pug. 425 (N. B.); *Jenkins v. Barrows*, 35 N. W. Reporter, 510 (Iowa, 1887); *Miller v. Stone*, 34 N. W. Reporter, 907 (Wis. 1887); *Sculthope v. Bates*, 5 Ont. Q. B. 318; *Cleveland Paper Co. v. Courier Co.*, 34 N. W. Reporter, 556 (Mich. 1887); *Plano Mfg. Co. v. Frawley*, 32 N. W. Reporter, 768 (Wis. 1887); *Cirkel v. Ellis*, 31 N. W. Reporter, 513 (Minn. 1887); *Garofalo v. Errico*, N. Y. S. C. (1887, March), 26 N. Y. Weekly Digest, 500. *In re Jewett*, 15 Bank. Reg. 135 (W. D. Wis. 1887); *Carmichael v. Greer*, 55 Ga. 116; *Wright v. Powell*, 8 Ala. 560; *Hefner v. Palmer*, 67 Ill. 161 (1873); *Palmer v. Pinkham*, 37 Me. 252; *Craig v. Alverson*, 6 J. J. Marsh. 609 (Ky.); *Wood v. Cullen*, 13 Minn. 394; *McStea v. Matthews*, 50 N. Y. 167; *Reed v. Kremer*, 5 Atlantic Reporter, 237 (Penn. 1886); *Bloch v. Price*, 32 Fed. Rep. 562 (1887); *Brundell v. Alexander*, 12 Victorian L. R. 908; *Elterson v. Leeds*, 97 Ind. 336; s. c. 49 Am. Rep. 458; *Pringle v. Leverich*, 97 N. Y. 181; s. c. 49 Am. Rep. 522; *Bank v. Smith*, 26 W. Va. 541.

to be indemnified by others against any loss falling in the first instance on himself; and although, in the case supposed, he cannot be believed to be a *partnér*, the lending of his name does justify the belief that he is willing to be responsible to those who may be induced to trust him for payment (*n*).

However, in *Alderson v. Pope* (*o*), Lord Ellenborough held, "that where there was a stipulation between A., B., and C., who appeared to the world as co-partners, that C. should not participate in the profit and loss, and should not be liable as a partner, C. was not liable as such to those who had notice of this stipulation, and that notice to one member of a firm was notice to the whole partnership." The report of this case states no more than what is here extracted, and the reader is left in doubt as to the meaning of the words "should not be liable as a partner." If these words meant that C. was to be indemnified by A. and B., the observations already made show, it is conceived, that the decision was erroneous. But if they meant that C. would not be liable at all to third parties for the acts of A. and B., then the question would arise whether this was not altogether inconsistent with C.'s conduct, and whether the maxim *protestatio facto contraria non valet* would not apply. In any point of view, the reported note of the case is unsatisfactory.

Effect of fraud.—Moreover, if a person has been induced by promises of irresponsibility or by fraud to hold himself out as a partner with others, this circumstance does not relieve him from liability to third parties who have been [**42*] induced by his conduct to trust * him as well as them, and who have had nothing to do with the promises or fraud practised upon him (*p*).

Observations on the phrase holding out.—The expression in *Waugh v. Carver*, "if he will lend his name as a partner he becomes as against all the rest of the world a partner," requires qualification; for the real ground on which liability is incurred by holding one's self out as a partner is, that credit

(*n*) See acc. *Brown v. Leonard*, 2 Chitty, 120.

(*o*) 1 Camp. 404, note.

(*p*) See *Collingwood v. Berkeley*, 15 C. B. N. S. 145; *Maddick v. Marshall*, 16 C. B. N. S. 387, and 17 ib. 829; *Ellis v. Schmaeck*, 5 Bing. 521;

Ex parte Broome, 1 Rose, 69. It will be seen in the volume relating to Companies that persons induced to join companies, by the false and fraudulent statements of directors, cannot on that ground escape from liability to creditors.

has been thereby obtained. This was put with great clearness by Lord Wensleydale in *Dickenson v. Valpy* (*q*), in which he said,—“If it could have been proved that the defendant had held himself out to be a partner, not to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged, and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff arising from his conduct as much as if he had stated to him directly and in express terms that he was a partner and the plaintiff had acted upon that statement” (*r*).

What constitutes a holding out.—Further, a person may hold himself out or permit himself to be held out as a partner, and yet conceal his name. He may be referred to as a person who does not wish to have his name disclosed; and if he is so referred to by his authority he will incur liability as a *quasi*-partner (*s*). But it follows, from the principles above explained, that a person cannot be liable on a contract, on the ground that he held himself out as a partner, unless he did so before the contract was entered *into (*t*). It also follows that [*43] no person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz., first, the alleged act of holding out must have been done either by him or by his consent (*u*), and secondly, it must have been known to the person seeking to avail himself of it (*x*). In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence

(*q*) 10 B. & C. 140. See, also, *Ford v. Whitmarsh*, Hurls. & Walmesley N. P. Reports, 53. Lord Blackburn, in *Scarf v. Jardine*, 7 App. Ca. 357, expressed the same idea in different words.

(*r*) See, too, *Vice v. Anson*, 7 B. & C. 409, where the defendant held herself out as a partner, but not to the plaintiff.

(*s*) *Martyn v. Gray*, 14 C. B. N. S.

824. See, also, *Maddiek v. Marshall*, 16 ib. 387, and 17 ib. 829.

(*t*) *Baird v. Planque*, 1 Fos. & Fin. 344.

(*u*) In *Fox v. Clifton*, 6 Bing. 776; *Edmundson v. Thompson*, 2 Fos. & Fin. 564, and 8 Jur. N. S. 235, the actions failed on this ground. See, also, *Cornelius v. Harrison*, 2 Fos. & Fin. 758.

(*x*) *Pott v. Eyton*, 3 C. B. 32, failed on this ground.

of the second, the person seeking to make him liable has not in any way been misled (*y*).

Continued use of old name after retirement of partner. — An instructive case on this head is *Newsome v. Coles* (*z*). There a firm of four partners carried on business under the name of Thomas Coles and Sons. Thomas Coles died, but the three sons carried on business in the old name for a few years; they then dissolved partnership, two of them establishing a new business and the other continuing the old business alone, but in the old name. The dissolution was advertised in the *Gazette*. The plaintiff, who did not know of the dissolution, but had had no dealings with the firm before its dissolution, sought to make all three brothers liable on a bill accepted after the dissolution by the one brother, who continued to trade under the old name, and had accepted the bill in that name.

The two other brothers, however, had never held themselves out to the plaintiff that they were partners in any firm of the name of Thomas Coles and Sons: they had done nothing to authorise the use of that name after the dissolution; at the same time they knew that the old name was still used, and they had taken no steps to prevent such use. This, however, it was held they were not bound to do, and the plaintiff failed. The case would have been decided differently if the plaintiff had been a customer of the firm before its [*44] dissolution, for in that * case he would have been justified in supposing that there had been no change in the firm (*a*).

Application of doctrine to inchoate partnerships, &c. — A person who holds himself out as willing to become a partner does not incur liability by so doing. Although a person who represents himself to be a partner, is properly held liable as a partner to persons who have acted on the faith of his being so, it would be in the highest degree unjust to confound a representation by a person that he intended to become a partner, with a representation that he was one in point of fact, and to hold him as much liable to third parties for the one representation as for the other. This distinction was

(*y*) See, also, the American case, *Thompson v. First National Bank of Toledo*, 4 Davis Sup. Ct. Rep. 531, 111 U. S. 529.

(*z*) 2 Camp. 617.

(*a*) See the note in 2 Camp. 620. See, also, *Carter v. Whalley*, 1 B. & Ad. 11, *infra*, Bk. 11, c. 2, § 3.

recognised and acted on in *Bourne v. Freeth* (*b*), where the defendant who had signed a prospectus containing the terms on which it was proposed to form a company, was held not to have held himself out as a shareholder therein.

Holding out, a question of fact. — Whether a defendant has or has not held himself out to the plaintiff is in every case a question of fact, not a question of law, and the consequence is, that there is great apparent conflict in the cases on this head. In *Wood v. The Duke of Argyll* (*c*), and in *Lake v. The Duke of Argyll* (*d*), the very same acts were relied on as a holding out, viz., being advertised as president of a society, acting as president at a meeting, and signing some resolutions then agreed upon; in the first case, this was considered not sufficient and the defendant had a verdict; whilst, in the last, it was considered to be sufficient and the plaintiff had a verdict. The jury was asked whether the defendant had held himself out as intending to pay for the work charged, and the question was answered in the affirmative in the one case, and in the negative in the other, and the Court in each case refused to disturb the verdict.

Defendant held out by others. — The most difficult cases of this class occur where the defendant has not held *himself* out, but where he has been held out by others, and he alleges that they had no authority to do so. If they had no such authority he is not liable (*e*). But express
* authority is not necessary; authority may be in- [*45]
ferred from his conduct (*f*); and if a person has by signing prospectuses or allowing his name to be put to them (*g*), or by being party to resolutions (*h*), or by his own statements, though not intended to be repeated (*i*), or has in any other way so conducted himself as in fact to have authorised the holding out which he repudiates, he will not escape liability.

Observations on the liabilities of promoters of companies, &c.
— It cannot be too carefully borne in mind in all cases of this description that a person who is neither a partner nor a

(*b*) 9 B. & C. 632. See, too, *Reynell v. Lewis*, 15 M. & W. 517, and *Wylde v. Hopkins*, ib. Compare *Martyn v. Gray*, 14 C. B. N. S. 824.

(*c*) 6 Man. & Gr. 928.

(*d*) 6 Q. B. 477.

(*e*) *Ante*, p. 43, note (*u*).

(*f*) See the last two cases.

(*g*) *Collingwood v. Berkeley*, 15 C. B. N. S. 145.

(*h*) *Maddick v. Marshall*, 16 C. B. N. S. 387, and 17 ib. 829.

(*i*) *Martyn v. Gray*, 14 C. B. N. S. 824.

quasi-partner. is liable on the general principles of agency, for acts done by others with his authority express or implied. If therefore, directors, members of committees, managers of clubs, or any other persons not in partnership, pass resolutions that work shall be done or goods supplied, they authorise whatever may be done in pursuance of such resolutions, and they are the persons naturally looked to, and *primâ facie* liable to pay for what may be so done (*k*). The question in these cases is simply one of agency, and the question of partnership or no partnership is immaterial, save that if a partnership can be established, the liability of one member for the acts of the others in the prosecution of their common object, follows almost as a matter of course.

Holding out by retiring partner.— In cases where partners carry on business under a name which does not disclose who the partners are, the doctrine of holding out must be applied with care. Suppose A. and B. carry on business under the name of X. & Co. Neither A. nor B. holds himself out as a member of that firm to any one who does not know their connection with it (*l*). If, therefore, A. retires from the firm, and gives no notice of his retirement, he will still be liable to old customers who knew of his connection with X. & Co., and who continue to deal with it on [*46] * the faith that A. is still a member of it; but A. will incur no liability to new customers of X. & Co. who never heard of him (*m*). Further if on A.'s retirement C. joins B., and B. and C. carry on business as X. & Co., even an old customer of X. & Co. who goes on dealing with it without notice of A.'s retirement or C.'s admission, cannot truly say that A. ever held himself out as a partner with C., or with both B. and C.: and, consequently, even an old customer cannot maintain an action against A., B. and C. jointly, for a debt contracted by X. & Co. after A.'s retirement. The old customer can, in the case supposed, sue A. and B. on the ground that he dealt with X. & Co. on the faith of A. and B. being still the members of that firm; or he can sue B. and C. on the ground that they are his real

(*k*) See the cases in the last five notes, and *Chapleo v. Brunswick Build. Soc.*, 6 Q. B. D. 696; *Firbank's Ex. v. Humphreys*, 18 Q. B. D. 54; *Doubleday v. Muskett*, 7 Bing. 110;

Braithwaite v. Skafeld, 9 B. & C. 401; *Burls v. Smith*, 7 Bing. 705.

(*l*) See *Newsome v. Coles*, *ante*, p. 43.

(*m*) See *Newsome v. Coles*, *ante*, p. 43.

debtors; but he must elect between A. and B. on the one hand and B. and C. on the other; he cannot (in the case supposed), sue A., B. and C. on the ground that B. and C. are in truth X. & Co., and that A. is estopped from denying that he is a member of that firm. This was decided in *Searf v. Jardine* (*n*). The case would be otherwise if A. and B. carried on business in their own names, and A. retired and C. came in, and if B. and C. carried on business with A.'s consent under the name of A., B. and C. In such a case A. would hold himself out as in partnership with both B. and C., and would be estopped from denying it as against any one dealing with the new firm on the faith of A. being a member of it.

Further, if the old customer did not know of A.'s retirement, but did know that C. had become a member of X. & Co., such customer would, it is apprehended, be entitled to sue A., B. and C. jointly for a debt contracted by X. & Co. after A.'s retirement and C.'s admission (*o*).

Holding out by surviving partner.—If a partner dies, and the surviving partners continue the old business in the old name, this will not have the effect of rendering the estate of the deceased liable, even to old *customers [*47] or correspondents of the firm, for acts done by the survivors after the death of their late co-partner. The doctrine of holding out has never been applied to such a case, and the executor of the deceased incurs no liability by the continued use of the old name (*p*). Even if the executor is the surviving partner using the old name, that will not make any difference; for although as executor he can give a lien on his testator's estate, ordinary debts contracted by him do not charge it (*q*).

The doctrine of holding out only applies in favour of persons who have dealt with a firm on the faith that the person whom they seek to make liable is a member of

(*n*) 7 App. Ca. 345. This case will be referred to hereafter when considering the liability of retired partners.

(*o*) *Searf v. Jardine* is not an authority against this proposition, nor are Lord Selborne's observations in 7 App. Ca. 350, as the author understands them.

(*p*) See *Webster v. Webster*, 3 Swanst. 490; *Devaynes v. Noble* (*Houlton's case*), 1 Mer. 616; *Vulliamy v. Noble*, 3 Mer. 614.

(*q*) See *Farhall v. Farhall*, 7 Ch. 123; *Owen v. Delamere*, 15 Eq. 134; but see *Vulliamy v. Noble*, 3 Mer. 614. See further on this subject, *infra*, Bk. IV. c. 1, § 2.

it (r).¹ The doctrine is entirely misapplied when it is extended beyond the principle on which it rests.

Torts. — For example, it has no application to actions of tort arising from the negligent conduct of a firm where no trust has been put in it. In *Stables v. Eley* (s), a retired partner, whose name was on a cart, was held liable for the negligence of its driver. But although in that case there may have been evidence to go to the jury that the defendant was liable, proof by him that the driver was not his servant would have rendered him not liable.

[*48] * SECTION III.—OF SUB-PARTNERSHIPS.

Sub-partnerships. — A sub-partnership is as it were a partnership within a partnership: it pre-supposes the existence of a partnership to which it is itself subordinate. An agreement to share profits only constitutes a partnership between the parties to the agreement. If, therefore, several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm.² The result of such an agreement is to constitute what is called a *sub-partnership*, that is to say, it makes the parties to it partners *inter se*; but it in no way affects the other members of the principal firm.

Socius mei socii, socius meus non est. — In the language of Civilians, *Socius mei socii, socius meus non est* (t). In *Ex parte Barrow* (u), Lord Eldon puts the law on this subject very clearly: “I take it,” he says, “to have been long since established, that a man may become partner with A. where A. and B. are partners and yet not be a member of that partnership which existed between A. and B. In the case of

(r) See *Scarf v. Jardine*, 7 App. Ca. 357, and *ante*, p. 42. where this blunder was first pointed out.

(s) *Stables v. Eley*, 1 C. & P. 614. (t) See Pothier, Partn. § 91.
See Pollock on Partn. ed. 3, p. 25, (u) 2 Rose, 252.

¹ One who is not a partner cannot be held liable on a contract made by the partnership with one who had no knowledge of the holding out, although he had held himself out to the world as a partner. *Thompson v. First Nat. Bank of Toledo*, 111 U. S. 529.

² *Burnett v. Snyder*, 76 N. Y. 344; 81 N. Y. 550; *Fitch v. Harrington*, 13 Gray, 468; *Reynolds v. Hicks*, 19 Ind. 113; and see *Shearer v. Paine*, 12 Allen, 289.

Sir Chas. Raymond, a banker in the city, a Mr. Fletcher agreed with Sir Chas. Raymond that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out from the firm of Raymond & Co. But it was held that he was no partner in that partnership; had no demand against it; had no account in it; and that he must be satisfied with a share of the profits arising and given to Sir Chas. Raymond" (x).

Liability to creditors. — Since the decision of the House of Lords in *Cox v. Hickman* (*ante*, pp. 30–35), a sub-partner cannot be held liable to the creditors of the principal firm by reason of his participation in the profits thereof (y).

*SECTION IV.—OF GENERAL AND PARTICULAR PARTNERSHIPS. [*49]

Universal Partnerships. — It is customary for writers on partnership law to divide partnerships into universal,¹ general, and particular (or special or limited), according to the extent of the contract entered into by the members. The classification is traceable to a passage in the Digest — "*Societates contrahuntur sive universorum bonorum, sive negotiationis alicujus, sive vectigalis sive etiam rei unius*" (z) — and

(x) See, too, *Bray v. Fromont*, 6 Madd. 5; *Ex parte Dodgson*, Mont. case of *Fairholme v. Marjoribanks*, 3 Ross, L. C. on Com. Law, 697.

(y) See on this subject the Scotch 5 pr.

(z) Dig. xvii. tit. 2 (*pro socio*), 1.

¹ "Such contracts are within the scope of the common law, but they are of very rare existence." Story on Part. 72. In *Rice v. Barnard*, 20 Vt. 479, two persons put into a common stock all their property real and personal, under an agreement to share equally all expenses and profits, and that all debts due from them, or either of them, should be paid out of the partnership property. It was held that instead of being strictly partners, they became, more strictly speaking, tenants in common in all present and future possessions. In *Lyman v. Lyman*, 2 Paine, 11, two brothers entered into a partnership in 1784, which continued until 1820, and during its continuance extended their business in different states, entering into navigation, importing goods, buying, selling and building vessels, and acquiring real estate, taking deeds and evidences of title, to either or both, without discrimination. It was held to be impracticable to fix limits to the partnership, that it must be considered general and unlimited, and all their property held in common, and that the separate acts of each were partnership transactions. *Houston v. Stanton*, 11 Ala. 412, was a similar case. See *Gray v. Palmer*, 9 Cal. 616; *Quine v. Quine*, 9 Smede & M. 155; *Waite v. Merrill*, 4 Greenleaf, 102.

is not worth enlarging upon, except for the purpose of distinguishing cases in which persons are partners in some trade or business generally, from those in which they are partners in some particular transaction or adventure only.

Partnership in one particular transaction only.— If persons who are not partners agree to share the profits and loss, or the profits, of one particular transaction or adventure, they become partners as to that transaction or adventure, but not as to anything else (*a*).¹ For example, if two solicitors, who are not partners, are jointly retained to conduct litigation in some particular case, and they agree to share the profits accruing therefrom, they become partners so far as the business connected with that particular case is concerned, but no further (*b*). So a partnership may be limited to the working of some particular patent (*c*); or to the working of it in some particular place or district (*d*). In all such cases as these, the rights and liabilities of the partners are governed by the same principles as those which apply to ordinary partnerships (*e*); but such rights and liabilities are necessarily less extensive than those of persons who have entered into less limited contracts. The extent to which persons can be considered as partners depends entirely on the agreement into which they have entered and upon their conduct.

(*a*) See *De Berkomp v. Smith*, 1 Esp. 29; *Heyhoe v. Burge*, 9 C. B. 431; *Smith v. Watson*, 2 B. & C. 401; see as to partnerships in profits only, *ante*, pp. 13, 14.

(*b*) *Robinson v. Anderson*, 20 Beav. 98, and 7 De G. Mac. & G. 239; *McGregor v. Bainbrigge*, 7 Ha. 104.

(*c*) As in *Lovell v. Hicks*, 2 Y. & C. Ex. 481.

(*d*) As in *Ridgeway v. Philip*, 1 Cr. M. & R. 415.

(*e*) See *Reid v. Hollinshead*, 4 B. & C. 867, and the cases cited in notes (*a*) and (*b*).

¹ *In re Warren, Daveis* (U. S. Dist. Ct.), 320, two attorneys in partnership speculated in lands. Upon the bankruptcy of one of them, it was held that each and every purchase made with a view to a joint sale on joint account, was a partnership transaction, and that a partnership may exist in a single as well as in a series of transactions. A joint-stock company, formed for the purpose of dealing in lands, held a partnership in *Clagett v. Kilbourne*, 1 Black, 346. See *Kramer v. Arthurs*, 7 Penn. St. 165. An association of separate owners of steamboats into a joint concern, to run their boats and collect and receive the earnings in a common fund, from which the expenses of all the boats is to be paid, is no more than a co-partnership in a particular business or transaction. *Connolly v. Davidson*, 15 Minn. 519. And though the parties contemplate only a single transaction, there may be a partnership. *Kayser v. Maugham*, 8 Colo. 232.

* SECTION V.—OF CLUBS AND SOCIETIES NOT HAVING
GAIN FOR THEIR OBJECT. [*50]

Societies not having gain for their object.—It follows from the propositions established in the foregoing pages, that no partnership or *quasi*-partnership subsists between persons who do not share either profit or loss, and who do not hold themselves out as partners.

Societies and clubs, the object of which is not to share profits, are not partnerships, nor are their members as such liable for each other's acts.¹ It was held in *Caldicott v. Griffiths* (*f*), that the members of "The Midland Counties Guardian Society for the Protection of Trade" were not partners *inter se*; and in *Flemyng v. Hector* (*g*) that the members of the "Westminster Reform Club" were not partners as against third persons (*h*). Such associations, although they consist of more than twenty members, need not be registered under the Companies Acts, 1862 (*i*). It is a mere mis-use of words to call such associations partnerships (*j*); and if liabilities are to be fastened on any of their members it must be by reason of the acts of those members themselves (*k*), or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association (*l*).

(*f*) 8 Ex. 898. See, too, *R. v. Whitmarsh*, 15 Q. B. 600; *Bear v. Bromley*, 18 ib. 271, as to their not requiring registration under the repealed act, 7 & 8 Viet. c. 110.

(*g*) 2 M. & W. 172.

(*h*) See, too, *Todd v. Emly*, 8 M. & W. 505; *The St. James's Club*, 2 De G. Mac. & G. 383.

(*i*) *Re Siddall*, 29 Ch. D. 1. They may be wound up under the act, as will be seen in the volume on that subject.

(*j*) See *ante*, p. 2. *R. v. Robson*, 16 Q. B. D. 137. In *Lloyd v. Loaring*, 6 Ves. 737, the Caledonian Lodge of Freemasons, and in *Silver v. Barnes*, 6 Bing. N. C. 180, and *Beaumont v.*

Meredith, 3 V. & B. 180, friendly societies were called partnerships. In *Minnitt v. Lord Talbot*, L. R. Ir. 1 Ch. D. 143, persons who had advanced money to add to and improve a club were held to have a lien on the property for their money.

(*k*) As in *Cross v. Williams*, 7 H. & N. 675, where the commandant of a rifle corps was held liable for all uniforms he had ordered.

(*l*) Compare *Flemyng v. Hector*, 2 M. & W. 172, and *Wood v. Finch*, 2 Fos. & Fin. 447, where the agency was not established, with *Lückombe v. Ashton*, 2 Fos. & Fin. 705; *Coekereell v. Aucompte*, 2 C. B. N. S. 440; *Burls v. Smith*, 7 Bing. 705, and *De-*

¹ A benevolent and social society has rarely, if ever, been considered a partnership. In *Lloyd v. Loaring*, the point was not made, but LORD ELDON thought the bill would lie on the ground of joint ownership of the personal

[*51] * **Societies in which each member acts for himself only.** — Upon the ground that there is neither community of profit nor community of loss, it has been held that no partnership subsists between the members of a mutual insurance society, in which each, in consideration of a payment made to him, underwrites a policy for a stipulated sum. A policy so underwritten is neither more nor less than a number of separate contracts, whereby each underwriter agrees, on a given event, to pay the whole or a proportionate part of the sum written against his name. In such a society there is no joint stock; the members of it enter into no joint contract; but each is alone liable for any loss which may happen to the insured, according to the terms of the contract into which each for himself has entered (*m*).

With respect to industrial and provident societies, see 39 & 40 Vict. c. 45.

SECTION VI.—OF CO-OWNERSHIP.

Co-owners not co-partners. — No partnership necessarily subsists among persons to whom property descends, or is given jointly or in common; and even if several persons agree to buy property, to hold jointly or in common, al-

launey *v.* Strickland, 2 Stark. 416, where the agency was established. In Luckombe *v.* Ashton, and Burls *v.* Smith, the defendant was a member of the managing committee. This was not the case in Cockerell *v.* Aecompte, or Delauney *v.* Strickland. See, too, Thomas *v.* Edwards, 2 M. & W. 215.

(*m*) See Strong *v.* Harvey, 3 Bing. 304; Redway *v.* Sweeting, L. R. 2 Ex. 400; Gray *v.* Pearson, L. R. 5 C. P. 568; Andrews' & Alexander's case, 8 Eq. 176; and as to suits between the members of such societies, Bromley *v.* Williams, 32 Beav. 177; Harvey *v.* Beckwith, 4 N.R. 90 and 298; and 12 W. R. 819 and 896.

property in the members of a Masonic lodge; there was no intimation that they were partners. Ash *v.* Guie, 97 Penn. St. 493; 39 Am. Rep. 818. See Babb *v.* Reed, 5 Rawle, 151.

A stipulation in the by-laws of a charitable society that a given sum shall be paid to the next of kin of a deceased member, will not sustain an action against surviving members. Payne *v.* Snow, 12 Cush. 443. See Sproat *v.* Porter, 9 Mass. 300. An association is not a partnership in which members agree in writing to pay their several subscriptions to erect a meeting-house, to be the property of the subscribers in proportion to their respective subscriptions. Woodward *v.* Cowing, 41 Me. 9. Club, society and company members may make themselves liable. Ferris *v.* Thaw, 5 Mo. Ap. 279; Richmond *v.* Judy, 6 Mo. Ap. 465; Blakely *v.* Bennecke, 59 Mo. 193; Eichbaum *v.* Irons, 6 W. & S. 67.

though by the purchase they become co-owners (*n*), they do not become partners unless that also was their intention (*o*).

* **Co-ownership and co-partnership compared.** — [*52] Speaking generally, and excluding all exceptional cases, the principal differences between co-ownership and partnership may be stated as follows:

1. Co-ownership is not necessarily the result of agreement. Partnership is.

2. Co-ownership does not necessarily involve community of profit or of loss. Partnership does.

3. One co-owner can, without the consent of the others, transfer his interest to a stranger, so as to put him in the same position as regards the other owners as the transferer himself was before the transfer. A partner cannot do this.

4. One co-owner is not as such the agent real or implied of the others. A partner is.

5. One co-owner has no lien on the thing owned in common for outlays or expenses, nor for what may be due from the others as their share of a common debt. A partner has.¹

6. One co-owner of land is entitled to have it divided between himself and co-owners, but not (except by virtue of a recent statute) to have it sold against their consent. A partner has no right to partition in specie, but is entitled, on

(*n*) As to whether joint purchasers become tenants in common, or joint tenants, see *Lake v. Gibson*, 1 Eq. Ca. Ab. 290; *Aveling v. Knipe*, 19 Ves. 441; *Crossfield v. Such*, 8 Ex. 825; *Harris v. Fergusson*, 16 Sim. 308; *Robinson v. Preston*, 4 K. & J. 505; *Bone v. Pollard*, 24 Beav. 283; *Harrison v. Barton*, 1 J. & H. 287, in which the admissibility of parol evidence on the point was much discussed. In *French v. Styring*, 2 C. B. N. S. 357, *ante*, p. 18, the race-horse was clearly held in common, the owners having become such at different times and by different titles.

(*o*) See *Kay v. Johnston*, 21 Beav. 536. Whether they intended to become partners or not may of course be doubtful, as in *Sharpe v. Cummings*, 2 Dowl. & L. 504, where two persons hired a field wherein to graze their cattle. This subject will be adverted to hereafter when treating of partnership property. Pothier has an appendix on the subject at the end of his essay on partnership; but the appendix is omitted from Mr. Tudor's translation of that essay. See further on this subject the last chapter in Story on Partnership.

¹ Where a horse is owned by two persons, neither party has a lien upon the share of the other, for expenses incurred, either for labor done upon the horse, as by shoeing, or for advertising him for sale. They are not partners, but tenants in common. *Goell v. Morse*, 126 Mass. 480. And see *Oliver v. Gray*, 4 Ark. 425; *Goodrich v. Willard*, 7 Gray, 183; *Chapman v. Eames*, 67 Me. 452; *Quackenbush v. Sawyer*, 54 Cal. 439.

a dissolution. to have the partnership property, whether land or not, sold, and the proceeds divided.

7. As between the real and personal representatives of a deceased co-owner of freehold land, the equitable as well as the legal interest in his share is real estate; whilst as between the real and personal representatives of a deceased partner, the equitable interest in his share of partnership freehold property is treated as personal estate, although the legal interest in it is real estate.

8. Co-ownership not necessarily existing for the sake of gain, and partnership existing for no other purpose, the remedies by way of account and otherwise which one [*53] co-owner * has against the others are in many important respects different from, and less expensive than, those which one partner has against his co-partners (*p*).

Co-owners sharing profits. — When, however, co-owners of property employ it with a view to profit, and divide the profit obtained by its employment, the difference if any between them and partners becomes very obscure. The point to be determined is whether from all the circumstances of the case, an agreement for a partnership ought to be inferred; but this is often an extremely difficult question.¹

If each owner does nothing more than take his share of the gross returns obtained by the use of the common property, partnership is not the result. On the other hand if the owners convert those returns into money, bring that money into a common stock, defray out of it the expenses of obtaining the returns, and then divide the net profits, partnership

(*p*) See *infra*, as to this.

¹ In *Woodward v. Cowing*, 41 Me. 9, subscribers to an agreement to erect a meeting-house, to be owned in proportion to their subscriptions, were held not to be partners. And where several parties agree in writing to contribute for the purchase of lands and building of mills, they are not parties, and those who proceed and carry out the undertaking, can recover the sum subscribed by a party who has not contributed. *Pillsbury v. Pillsbury*, 20 N. H. 99. One joint-owner of a chattel sold it to a person who knew of the joint-ownership. The purchaser was held to be a co-owner only, and accordingly when the purchaser had resold it, the statute of limitations began to run at the last sale. *Browning v. Cover*, 103 Penn. St. 595. In the absence of an agreement to the contrary, ship-owners are tenants in common. Story on Part. 417; *Coursin's Appeal*, 79 Penn. St. 220. And the agreement or intention of joint-owners to become partners must be clear, otherwise community of goods make the owners tenants in common only. *Chisholm v. Cowles*, 42 Ala. 179; *Sargent v. Downey*, 45 Wis. 498; *Seeley v. Albrecht*, 41 Mich. 525; *Thurston v. Horton*, 16 Gray, 274.

is created in the profits if not also in the property which yields them. Many perplexing cases may be imagined intermediate between those here put as examples, but the following illustrations will, it is hoped, enable the reader to appreciate the distinction in question.

Joint purchasers of goods for re-sale.—If several persons jointly purchase goods for re-sale, with a view to divide the profits arising from the transaction, a partnership is thereby created (*q*). But persons who join in the purchase of goods, not for the purpose of selling them again and dividing the profits, but for the purpose of dividing the goods themselves, are not partners and are not liable to third parties as if they were. *Coope v. Eyre* (*r*) is a leading case in support of this proposition. There an agreement was come to that one person should purchase oil and then divide it amongst himself and others, they paying him their proportion of the price. The oil was bought accordingly, and the purchaser becoming bankrupt, the seller sought to make the other parties to the agreement pay for the oil. But it was held that the purchaser purchased as a principal and not as an agent, and that as there was no community of profit or loss, the persons amongst whom the oil was to be divided could not be *made liable as partners or [*54] *quasi*-partners. In *Hoare v. Dawes* (*s*) there was a similar agreement, and Lord Mansfield thought at first that there was a *quasi*-partnership, but he and Willes, Ashhurst, and Buller, JJ., ultimately decided that there was not, there being no agreement to share profit or loss, and there being no pretence for holding the purchasers liable for the acts of each other by reason of their holding themselves out as partners.

So in *Gibson v. Lupton* (*t*), two persons joined in the purchase of some wheat with the intention of dividing and paying for it equally, and it was held that as there was no joint interest in profit or loss they could not be considered partners, either as between themselves or as regarded third parties.

Part-owners sharing the produce of their property.—Moreover, part-owners who divide what is obtained by the use or employment of the thing owned, are not thereby constituted partners. For example, if two tenants in common of a

(*q*) *Reid v. Hollinshead*, 4 B. & C. 867.

(*r*) 1 H. Blacks. 37.

(*s*) 1 Doug. 371.

(*t*) 9 Bing. 297.

house let it and divide the rent equally amongst them, they are not partners, although they may pay for repairs out of the rent before dividing it (*u*). So two persons who are tenants in common of a race-horse, and share his winnings on the one hand, and the expenses of his keep on the other, are not partners, but co-owners only (*x*). So part-owners of ships are not usually partners (*y*), although they may be partners as well as part-owners, as was the case in *Campbell v. Mullett* (*z*).

Co-owners of mines. — So again with respect to mines and quarries. Tenants in common or joint tenants of a mine or quarry may or may not be partners; and the mine or quarry itself may or may not be part of a common stock.¹ But it is highly inconvenient, if not altogether impossible, for co-owners of a mine or quarry to work it themselves [*55] without becoming partners, at least in the *profits of the mine; and persons who work a mine or quarry in common are regarded rather as partners in trade than as mere tenants in common of land (*a*).

Three cases have here to be considered: —

1. **Co-owners partners in profits and in mine.** — The co-owners may be partners not only in the profits but also in the mine itself. The co-owners are then partners to all intents and purposes, and their mutual rights and obligations are determined by the law of partnership as distinguished from the law of co-ownership (*b*).

2. **Co-owners not partners at all.** — The co-owners may not be partners at all; neither in the profits nor in the mine.

(*u*) See *per Willes, J.*, in the case cited in the next note. See, also, *Lyon v. Knowles*, 3 B. & Sm. 556, where the gross receipts of a theatre were divided; and *London Financial Assoc. v. Kelk*, 26 Ch. D. 107.

(*x*) *French v. Styring*, 2 C. B. N. S. 357; *quære*, whether there was in this case a partnership in the profits? It would seem not; the agreement being to divide the winnings as gross returns. See *ante*, p. 18.

(*y*) *Helme v. Smith*, 7 Bing. 709; *Ex parte Young*, 2 V. & B. 242; *Ex parte Harrison*, 2 Rose, 76; *Green v. Briggs*, 6 Hare, 395.

(*z*) 2 Swanst. 551. See *ib.* p. 575.

(*a*) See *Jefferys v. Smith*, 1 Jac. & W. 298; *Crawshay v. Maule*, 1 Swanst. 495; *Fereday v. Wightwick*, 1 R. & M. 45.

(*b*) There is no authority for saying that in this case one of the partners can in the absence of a special agreement or custom, assign his share without the consent of the other partners. That in this case the right is to a sale, and not to a partition of the mine, see *Wild v. Milne*, 26 Beav. 504; *Crawshay v. Maule*, 1 Swanst. 495; *Lees v. Jones*, 3 Jur. N. S. 954.

¹ Mining partnership defined in *Kahn v. Smelting Co.*, 102 U. S. 641; see also *Taylor v. Castle*, 42 Cal. 367.

Their mutual rights and obligations are then determined by the law of co-ownership as distinguished from the law of partnership. In this case each owner is entitled to an account of what the others have got from the mine more than their share (*c*); and to transfer his share in the mine without the consent of the other owners (*d*); and to have a partition made of the mine between him and them. But the writer conceives that in the case now supposed no owner is entitled to have the mine sold against the consent of the others (*e*). Whether, if the co-owners cannot agree as to the mode of working the mine, an action will lie for the appointment of a receiver and manager, is not settled. Lord Eldon in *Jefferys v. Smith* (*f*), is generally understood to have intimated that it will; but the case before him was not of the description now under discussion, being one in which the mines were worked in partnership; and in a recent and carefully *considered case the contrary rule was treated as [*56] more correct (*g*).

3. **Co-owners partners in profits only.**—The co-owners of a mine may work it together, bring the produce into a common fund, and be partners in the profits of the mine but not in the mine itself. In this case the mutual rights and obligations of the owners are determined partly by the law of partnership and partly by the law of co-ownership, and some curious anomalies are the consequence. The most important of these are as follows:—

1. Each co-owner may transfer his interest in the mine and in the partnership working it, without the consent of the other owners (*h*).¹

(*c*) *Denys v. Schuckburgh*, 4 Y. & C. Ex. 42.

(*d*) *Bentley v. Bates*, 4 Y. & C. Ex. 182.

(*e*) *I. e.*, except under the Act 31 & 32 Vict. c. 40, enabling a sale to be made in lieu of partition. See *Steward v. Blakeway*, 4 Ch. 603, and 6 Eq. 479.

(*f*) 1 J. & W. 302. *Wynget v. Heathcote*, cited in 4 Y. & C. Ex. 187, supports the same view, but the cir-

cumstances of the case are not sufficiently known.

(*g*) *Roberts v. Eberhardt*, Kay, 148. Where the mine has been worked in partnership, and the partnership has been dissolved, and the mine ordered to be sold, an interim receiver and manager will, if necessary, be appointed, *Lees v. Jones*, 3 Jur. N. S. 954.

(*h*) *Bentley v. Bates*, 4 Y. & C. Ex. 182; *Crawshay v. Maule*, 1 Swanst. 517-9.

¹ Owners of a mine, who co-operate in working it, constitute a mining partnership; such a partnership is not dissolved by the death, bankruptcy, or alienation or mortgage of the share of one of its members. Such a partnership

2. Each co-owner is entitled to maintain an action for an account against the others without seeking for a dissolution of the partnership (*i*).

3. Upon a dissolution of the partnership, the mine itself, not being partnership property, must be divided between its several owners and not be sold (*k*): unless under the statute enabling sales to be made in lieu of partition (*l*).

4. As between the real and personal representatives of a deceased partner, his share of the mine will be real and not personal estate (*m*).

5. With a view to a dissolution the court will, if necessary, appoint a receiver and manager to carry on the mine for the benefit of all parties interested (*n*).

6. The obligation of each co-owner to account to [*57] the *others, is the same as that of one partner to account to his co-partners, and much more extensive therefore than the obligation which exists in a case of mere co-ownership. The lien which each partner has on the shares of his co-partners for what is due from them to the partnership extends to cases of this 3d class (*o*); as does also the obligation which one partner is under to account to his co-partners for benefits he may have received in respect of the common property. It has been decided that where two tenants in common of a mine construct a shaft at their own expense in land belonging to one of them exclusively, money

(*i*) *Bentley v. Bates*, 4 Y. & C. Ex. 182.

(*k*) *Steward v. Blakeway*, 4 Ch. 693, and 6 Eq. 479. A sale was decreed in the cases referred to, *ante*, note (*b*), but in them the mine was a partnership asset. Consider the analogous case of a ship.

(*l*) 31 & 32 Vict. c. 40.

(*n*) *Steward v. Blakeway*, *ubi sup.*

(*n*) *Roberts v. Eberhardt*, Kay, 148; *Lees v. Jones*, 3 Jur. N. S. 954;

Jefferys v. Smith, 1 J. & W. 302; *Rowe v. Wood*, 2 ib. 553; *Wynget v. Heathcote*, cited 4 Y. & C. Ex. 187. Whether a receiver and manager will be appointed if no solution is sought, see the judgment in *Roberts v. Eberhardt*.

(*o*) *Fereday v. Wrightwick*, 1 R. & M. 45; *Roberts v. Eberhardt*, Kay, 148; *Crawshay v. Maule*, 1 Swanst. 495.

is governed by some of the rules of ordinary partnership, and by some peculiar to itself. *Kahn v. Central Smelting Co.*, 102 U. S. 641, 26 L. ed. 266. There is no *delectus personarum*, *ib.*; and no relation of trust or confidence to prevent a sale or assignment to a stranger, or another partner. *Bissell v. Foss*, 114 U. S. 252, 29 L. ed. 126. And in the absence of an express agreement, one partner cannot share in a purchase by another of the interest of a co-partner, *ib.* One co-owner of a mine cannot bind his co-tenants by a license to mine. *Tipping v. Robbins*, 64 Wis. 546. And a mining partner may buy or sell other shares without consulting his co-partner. *Bissell v. Foss*, *supra*.

paid by a stranger for the use of that shaft belongs to both tenants and not exclusively to him in whose land the shaft is constructed (*p*).

Note on the remedies available by one co-owner against the others.

In order still further to understand the differences between co-ownership and co-partnership it is necessary to compare the rights and remedies of co-owners against each other with the corresponding rights and remedies of partners. The rights and remedies of partners *inter se*, will be fully investigated hereafter; but as there is no compendious summary of the rights and remedies of co-owners *inter se*, the following note is here appended.

The obligation of a partner to account with his co-partner arises *ex contractu*, and this obligation is not confined to the partners themselves, but devolves, with its correlative right, upon their respective representatives. The obligation of one co-owner to account with the other for the profits which may have arisen from the common property cannot be based upon contract where no contract has been entered into; but it by no means follows, that because there is no contract, express or tacit, to share profits, each co-owner ought to be entitled to get what he can and to keep what he may get. This was seen plainly enough by the Roman lawyers, who properly held an obligation to arise *quasi ex contractu*, and who found no difficulty in declaring that every co-owner ought to account to the others for the profits received by himself, and to contribute with them to the expenses properly incurred for the common benefit (*q*). Our ancestors, however, seem to have taken a different view of the matter.

*By the strict rule of the common law, one co-owner of land [*58] was entitled to no account from another unless the former had made the latter his bailiff, or had been actually ousted from the land (*r*); and one co-owner of a chattel had no remedy against another, unless he had destroyed the common property (*s*). The statute 4 Anne, c. 16, § 27, has placed co-owners of land in a somewhat better position than they were in before, by enacting that an action of account may be maintained by one co-owner against another for receiving more than his share: but nothing has been done to improve the law as to co-owners of chattels except by the introduction by Equity Judges of rules founded on the principles of the Roman law.¹

(*p*) Clegg v. Clegg, 3 Giff. 322.

and tit. 3, l. 4, § 3, and lib. xvii. tit. 2, l. 34.

(*q*) See Inst. lib. 3, tit. 27, §§ 3-5; and Dig. lib. x, tit. 2, l. 25, § 16,

(*r*) See Co. Lit. 200.

(*s*) *Ibid*.

¹ The statute 4 & 5 Anne, c. 16, is a remedial one, and ought to receive a liberal construction. It was enacted to provide a relief which could not be had at common law; and the mode pointed out by an action of *account*, ought to be considered as put by way of example, not of limitation. It was accord-

The inadequacy of the remedies available by one co-owner against another at common law is justified by early writers upon the ground that each tenant in common has it in his own power to enter on the common property, if it be land, and to get possession of the common property, and retain it, if it be an ordinary chattel; and according to the writers in question, it is only when one co-owner prevents the other from entering in the first case, and, by destroying the chattel, from getting possession of it in the other, that there is any necessity for having recourse to an action (*t*). The unsatisfactory nature of this reasoning is too apparent to require comment: for admitting its force in the case of land, it is plainly in the highest degree unjust to allow one co-owner of a valuable chattel to keep it exclusively in his own possession, and to tell the other that his only remedy is to take it peaceably when he sees his time, and having got it to be careful not to part with it. Unsatisfactory, however, as the reasoning is, it affords the only explanation of the actual state of the law upon the subject under consideration.

In order to understand accurately the remedies, which by the law of this country are available for one co-owner against another, it is necessary, in the first place, to distinguish land from chattels.

1. *With respect to land.*

Co-owners of land.—1. If land is owned by several persons, jointly or in common, each is entitled to enter upon and occupy it (*u*).

2. If any one of them is actually excluded by the others he can bring an action for the recovery of his undivided share (*x*); and having recovered he can sue for mesne profits (*y*); and in an action for them the jury are not bound to confine the damages to the value of the actual profits made by the defendant (*z*). In case of actual exclusion or de-
[*59] struction an action for *damages will also lie by one co-owner against the other (*a*); and now an injunction and a receiver can be obtained, even although there is no actual exclusion (*b*).

(*t*) See Lit. § 323.

(*u*) Lit. § 323. One is not entitled to a receiver as against the others if they do not exclude him, *Sandford v. Ballard*, 30 Beav. 109. See *infra*, note (*b*).

(*x*) Lit. §§ 322 and 323 and Coke's Com. upon them. As to evidence of actual exclusion, see *Doe v. Prosser*, Cowp. 217; *Jacobs v. Seward*, L. R. 5 H. L. 464.

(*y*) *Goodtitle v. Tombs*, 3 Wils. 118.

(*z*) *Ibid*.

(*a*) *Cresswell v. Hedges*, 1 H. & C. 421, where the defendant paid money into court in respect of the damage to the plaintiff's share.

(*b*) See Jud. Act, 1873, § 25, cl. 8. *Porter v. Lopes*, 7 Ch. D. 358; *Sandford v. Ballard*, 33 Beav. 401.

ingly held that *indebitatus assumpsit* would lie where one tenant in common of a ship sold the whole and received the proceeds. *Jones v. Harraden*, 9 Mass. 540. And where an insolvent debtor conveyed to a creditor the moiety of a machine, the profits of which were to be distributed among the creditors of the insolvent, the creditor maintained *assumpsit* for his share. *Brigham v. Eveleth*, 9 Mass. 538. See also *Munroe v. Luke*, 1 Met. 459; *Shepard v. Richards*, 2 Gray, 424; and *Badger v. Holmes*, 9 Gray, 118.

3. Subject to the provisions of the act of 31 & 32 Vict. c. 40, one co-owner of land is entitled to have it divided between himself and the other owners, although they may not desire a partition (*c*).

4. If one co-owner makes the other his bailiff or receiver, the latter can be compelled to account, not only for what he has received, but also for what he might have received without his own wilful default (*d*).

5. And by the statute of Anne (4 Anne, c. 19, § 27) one co-owner who receives more than his share can be made to account to the other owners for what he has received more than he ought (*e*).¹

6. But it has been decided, since the passing of this statute, that one co-owner of land, who merely occupies the whole, is not liable to pay any rent to the other owners (*f*).

7. And it has also been decided that if one co-owner not only occupies the whole land, but expends his own industry and capital upon it, and thereby realises profit (*e.g.* by farming), he is not liable to account to his co-owners for any share of such profit (*g*).

8. But if one co-owner of land derives gain, not from the mere use of the land by himself, but by being paid for the use thereof by others, he must account to the other owners for what he receives beyond his own share (*h*).

9. *A fortiori*, if one co-owner of land derives gain by wasting the common property, he is liable to account to the other owners for their shares of the money so obtained (*i*). He can also be restrained by a co-tenant from committing destructive waste (*k*), but not from cutting timber in a *proper and judicious manner; nor, it is conceived, from [*60] mining in a similar way (*l*).

10. If one of several joint tenants, or tenants in common of a house, lays out money in necessary repairs, his outlays will be taken into account upon a partition or sale (*m*); but he cannot enforce contribution

(*c*) See Bac. Ab. Joint-tenants, I. 7, and *Agar v. Fairfax*, 17 Ves. 533, and the notes to it in 2 Wh. & Tud. L. C.

(*d*) Co. Lit. 200 *b*, and 172 *a*.

(*e*) The remedy of law was by an action of account and not by an action for money had and received, *Thomas v. Thomas*, 5 Ex. 28; *Jacobs v. Seward*, L. R. 5 H. L. 464.

(*f*) *Teadale v. Sanderson*, 33 Beav. 534; *Wheeler v. Horne, Willes*, 208; *McMahon v. Burchell*, 2 Ph. 127. But see *Drury v. Drury*, 1 Rep. in Ch. 49. In *Turner v. Morgan*, 8 Ves. 145, there was exclusion. Where one of the co-owners is an infant, see *Pascoe v. Swan*, 27 Beav. 508.

(*g*) *Henderson v. Eason*, 17 Q. B.

701, and 2 Ph. 308; *Jacobs v. Seward*, L. R. 5 H. L. 464.

(*h*) *Henderson v. Eason*, 17 Q. B. 701. See, too, *Clegg v. Clegg*, 3 Giff. 322, *ante*, p. 57, note (*p*); *Carter v. Horne*, 1 Eq. Ca. Ab. 17, as to sharing benefits derived by one.

(*i*) Co. Lit. 200 *b*; *Martyn v. Knowllys*, 8 T. R. 145. See the last sentence in the judgment. See, as to injunctions to restrain waste, *Twort v. Twort*, 16 Ves. 128.

(*k*) *Arthur v. Lamb*, 2 Dr. & Sm. 428; *Wilkinson v. Haygarth*, 12 Q. B. 837.

(*l*) *Arthur v. Lamb*, 2 Dr. & Sm. 428; *Wilkinson v. Haygarth*, 12 Q. B. 837.

(*m*) See *Leigh v. Dickeson*, 15 Q. B. D. 60.

¹ See *Munroe v. Luke*, 1 Met. 459, where money had and received was maintained.

by an action for damages (*n*) unless he and his co-tenants are under some duty or obligation to others to repair. See the authorities in notes (*m*) and (*n*): nor has he any lien on the house or on the interest of his co-tenants therein for their shares of the expense (*o*).¹

2. *With respect to chattels.*

Co-owners of Chattels.—Ships are by far the most important chattels usually owned in common. But great care is required in applying the rules which govern ships to other chattels; for, in the first place, the principles enforced in the court of admiralty differ in many important respects from those by which the ordinary courts are governed; and, in the next place, the stringent provisions of the ship registry acts have frequently rendered it impossible to apply to ships those general doctrines of equity which are applicable to other kinds of property. For the purpose, therefore, of avoiding error in pursuing the present subject of inquiry, ships must be distinguished from other chattels.

1. **Ships.**—A considerable portion of the law which regulates the mutual rights and obligations of part-owners of ships is based upon the assumption that it is particularly for the benefit of the public that ships should not lie idle (*p*). Hence it is that a majority of the part-owners of a ship can employ her against the will of the others, upon giving them security to the value of their shares (*q*); a course which cannot be taken by a majority of the part-owners of any other chattel. Where a ship is sent on a voyage by some of the part-owners against the will of the others, the dissentients are not entitled to share the profits of the voyage (*r*), nor are they liable to contribute to its losses (*s*). But where a ship is employed by all the part-owners, or by some of them, but not against the will of the others (*t*), they all share her gross earnings, and contribute to the expenses incurred, in obtaining them; and in such a case there is little, if any, difference between the account which is taken between the part-owners, and that which would be taken if they were actually partners.

[*61] * Before any division of profits amongst the part-owners, the gross freight or earnings of the adventure must be applied in pay-

(*n*) *Ibid.*, where the passages in Co. Lit. 200 *a*, and F. N. B. 162, and the old writ of contribution, are explained.

(*o*) *Re Leslie*, 23 Ch. D. 552. See also *Kay v. Johnston*, 21 Beav. 536; *Teasdale v. Sanderson*, 33 Beav. 534.

(*p*) See MacLachlan on the Law of Merchant Shipping, p. 90, ed. 2.

(*q*) *Ibid.* p. 94.

(*r*) *Anon.*, 2 Ch. Ca. 36; *Davis v. Johnston*, 4 Sim. 539.

(*s*) *Horn v. Gilpin*, 1 Amb. 255. *Davis v. Johnston*, 4 Sim. 539, is not opposed to this. The marginal note, however, is calculated to mislead.

(*t*) *Strelly v. Winson*, 1 Vern. 296, as corrected by *Horn v. Gilpin*, 1 Amb. 255.

¹ In a bill for an account between tenants in common, defendant was allowed the expenses of repairs, which increased the value and income of the common property, *Pickering v. Pickering*, 63 N. H. 468; but not the expense of insurance, *ib.* See, also, *Jackson v. Lewis*, 4 Cow. 168; *Green v. Biddle*, 8 Wheat. 1; *Rathburn v. Colton*, 15 Pick. 485.

ment of the expenses of the voyage yielding them, including the costs of repairs and outfit for that voyage (*u*). Lord Hardwicke went further, and held that each part-owner had a lien on the ship itself, and on the proceeds of its sale for the balance due to him from the other owners on the joint account, and had a right to a sale of the ship as if it were partnership property (*x*). But Lord Eldon thought this was going too far; and he reversed Lord Hardwicke's decision; and it is now settled that there is no such lien or right (*y*). Lord Eldon's view, however, has not prevailed in America (*z*).

2. **Other Chattels.**—Passing from ships to other chattels, the position of a part-owner not in possession was at law most disadvantageous; for 1, he could not obtain possession otherwise than by taking the thing itself if he had the chance (*a*); 2, he could not obtain the value of his share unless the thing had been actually or virtually destroyed (*b*); and 3, these rules applied as well to the produce of the thing, as to the thing itself (*c*). Whether, if one tenant in common of a chattel sold it, the other had any remedy at law for his share of the money produced by the sale, was doubtful (*d*), unless the sale had conferred a good title to the entirety upon the purchaser, when a remedy clearly existed (*e*).

The obligation of a co-owner of a chattel to account for the gain which he might have derived from its use may therefore be said to have been hardly, if at all, recognised at law. In equity the case was otherwise, but it is surprising how little direct authority there is upon the subject of co-ownership, if the decisions relating to ships and the winding-up of partnerships are excluded from consideration. The principles, however, upon which these decisions are based, may safely be applied to other cases if the anomalies introduced by the ship registry acts, and the fact that the rights of partners and those claiming under them depend upon contract, are borne in mind.

When the profits derived by one part-owner of a chattel are not attributable to his own industry and exertions, but are simply what he receives from others in respect of it (*e.g.* dividends of stock, or shares, or money paid for hire)—or where the profits are produced in the ordinary *course of nature (*e.g.* by breeding)—there is no difficulty in [*62] coming to the conclusion that his co-owners are entitled to make him account to them for their shares of what their property may have produced. Further, when one co-owner of a chattel derives gain from

(*u*) *Green v. Briggs*, 6 Ha. 395; *Lindsay v. Gibbs*, 22 Beav. 522, and 26 ib. 51, and 3 De G. & J. 690; *Alexander v. Simms*, 18 Beav. 80, and 5 De G. M. & G. 57.

(*x*) *Doddington v. Hallet*, 1 Ves. S. 497, and see *A.-G. v. Borrodaile*, 1 Price, 148, and *per* Lord Eldon, 2 V. & B. 243.

(*y*) *Ex parte Young*, 2 V. & B. 242; *Ex parte Harrison*, 2 Rose, 76.

(*z*) See Story on Part. § 444.

(*a*) Lit. § 323, and see 2 Wms. Saund. 47 *o*.

(*b*) Co. Lit. 200; *Jacobs v. Seward*, L. R. 5 H. L. 464.

(*c*) See *Fennings v. Grenville*, 1 Taunt. 241, where a whale had been converted into blubber and oil.

(*d*) See *Ileath v. Hubbard*, 4 East, 110; *Mayhew v. Herriek*, 7 C. B. 229; *Morgan v. Marquis*, 9 Ex. 145; *Barton v. Williams*, 5 B. & A. 395; and *Williams v. Barton*, 3 Bing. 139.

(*e*) See *Jacobs v. Seward*, L. R. 5 H. L. 464, and the cases in the last note, and *per* Willes, C. J., in *Wheeler v. Horn*, Willes, 208.

its use, and those gains are attributable, mainly, or in part, to his own industry and exertions, justice to the other owners and to him requires, either that the gains made by him shall be shared by all, they making him a proper allowance for his trouble and reimbursing his expenses; or that he shall be allowed to keep the whole profits, paying the other owners a proper sum for the use of their property. Of these two modes of adjusting the rights of the parties, the first seems to be most in accordance with the course usually adopted in analogous cases. Notwithstanding, therefore, the little direct authority upon the point, the writer ventures to submit that as a general rule where one owner of a chattel derives gain from its use, he is, independently of any contract, bound to account to the other owners for their respective shares, he being allowed all proper charges and expenses (*f*).

Co-owners of patents and copyrights.—Cases may, nevertheless, arise in which justice may be done by allowing each co-owner to make what he can and to keep what he may get. This may occur where the chattel is such that each co-owner can, in fact, enjoy his rights to the full extent, without the concurrence of the other owners (*e.g.* where the chattel is a patent for an invention). In the case of a patent, belonging to several persons in common, each co-owner can assign his share and sue for an infringement (*g*), and can also work the patent himself, and give licences to work it, and sue for royalties payable to him for its use (*h*); and it is now settled that he is entitled to retain for his own benefit whatever profit he may derive from the working, although it is perhaps still open to question whether he is not liable to account for what he receives in payment of the licences (*i*). The mutual rights of co-owners of a copyright, not being partners, have not been much discussed: but it has been decided that a licensee to represent a dramatic entertainment granted by one only of several co-owners of the copyright in it does not bind the others; nor prevent them from recovering their shares of the penalties imposed by statute on persons who infringe the copyright (*k*).

If part-owners of an ordinary chattel cannot agree who ought to have it, or how it ought to be employed, the only remedy (if any) appears to be by an action for an injunction or a receiver and a sale (*l*).

(*f*) See the judgment of V.-C. Wigram, in *Green v. Briggs*, 6 Ha. 395, and *Strelley v. Winson*, 1 Vern. 297. See, also, 1 Story's Eq. Jur. § 466.

(*g*) See *Dunnicliff v. Mallett*, 7 C. B. N. S. 209, and *Walter v. Lavater*, 8 ib. 162. As to tenants in common of trade-marks, see *Dent v. Turpin*, 2 J. & H. 139.

(*h*) *Sheehan v. Great East. Rail. Co.*, 16 Ch. D. 59.

(*i*) *Mathers v. Green*, 1 Ch. 29 reversing S. C. 34 Beav. 170. The same point was discussed, but not decided in *Hancock v. Bewley, Johns*. 601. See, also, *Russell's Patent*, 2 De G. & J. 130; *Horsley v. Knighton's Patent*, 8 Eq. 475.

(*k*) *Powell v. Head*, 12 Ch. D. 686. See some observations on the indivisibility of copyright in 4 H. L. C. 992.

(*l*) See Jud. Act, 1873, § 25, cl. 8.

* CHAPTER II.

[*63]

OF THE CONSIDERATION OF A CONTRACT OF PARTNERSHIP.

Consideration for a partnership. — Agreements to share profits, like all other agreements, require to be founded on some consideration in order to be binding. Any contribution in the shape of capital or labour, or any act which may result in liability to third parties, is a sufficient consideration to support such an agreement (*a*).

A *bonâ fide* contract of partnership is not invalidated by the unequal value of the contributions of its members, for they must be their own judges of the adequacy of the consideration of the agreement into which they enter.¹

As observed by Vice-Chancellor Wigram, "If one man has skill and wants capital to make that skill available, and another has capital and wants skill, and the two agree that the one shall provide capital and the other skill, it is perfectly clear that there is a good consideration for the agreement on both sides, and it is impossible for the Court to measure the quantum of value. The parties must decide that for themselves" (*b*).

Profits to be shared, but losses not. — It often happens that persons agree that all profits shall be shared rateably, and,

(*a*) See *The Herkimer*, Stewart's Adm. Rep. 23; *Anderson's case*, 7 Ch. D. 75.

(*b*) *Dale v. Hamilton*, 5 Ha. 393.

¹ In *McCord v. Field*, 27 Ont. C. P. 391, Field was to allow the *use of his name only* to secure an interest in a macadamized road contract. A ruling that an agreement in a contract of partnership to pay one partner \$200 "if he should withdraw from the contract without having shared the benefit of the business at all," at any time at his election, was not a contract without consideration in law, held erroneous. *Frothingham v. Seymour*, 118 Mass. 489. And where there is no mutuality, the agreement is void. *Mitchell v. O'Neale*, 4 Nev. 504. In *Belcher v. Conner*, 1 So. Car. 88, although the business of the partnership was the buying and selling of slaves, yet it was held that the purchase of slaves was not the consideration of the contract.

By an agreement to become stockholders in specified shares in a partnership, and pay the amount subscribed, signed by a number of persons, with their respective and aggregate shares stated against their name, each party promises to pay, and the promises of the others are a consideration for the promise of each. *Kimmins v. Wilson*, 8 W. Va. 584.

nevertheless, that all losses shall be borne by some one of them exclusively. Such an agreement is not necessarily invalid as a *nudum pactum*; for it is nothing more than an agreement, providing, amongst other things, that some or one of the partners shall indemnify the others against losses; and the very fact that these latter become, or agree to become, partners is quite sufficient consideration to give validity to a contract that they shall be indemnified. Such agreements appear, moreover, to be reasonable, where the partners

[*64] *indemnified leave the whole management of the concern to their co-partners (c).

Of the return of premiums.

Premiums.—It frequently happens, when one person is admitted into partnership with another already established in business, that it is agreed that the incoming partner shall pay the other a premium, *i.e.*, a sum of money for his own private benefit. Such an agreement is valid; and if the premium is not duly paid, it may be recovered by an action, provided the plaintiff has been ready and willing to take the defendant into partnership as agreed (d).

The consideration for the premium is not only the creation of a partnership between the person who takes, and him who parts with, the money, but also the continuance of that partnership; and if a person on his entry into a partnership pays a premium and then the partnership is determined sooner than was expected, the question arises whether any, and if any, what part of the premium ought to be returned?¹

(c) *Geddes v. Wallace*, 2 Bli. 270, is an instance of such an agreement. However, in *Brophy v. Holmes*, 2 Moll. 1, the L. C. Hart expressed an opinion that an agreement between A. and B. that A. should advance capital, that B. should be sole manager, and that they should divide the profits equally, but that all losses should fall on B. was, as regards the

last stipulation, void, as being *nudum pactum*; and his Lordship thought that under such an agreement the losses should be borne equally. But see, as to such partnerships, *ante*, pp. 15 *et seq.*

(d) *Walker v. Harris*, 1 Anstr. 245, where it was held that no partnership deed need be tendered.

¹ *Davidson v. Thirkell*, 3 Ont. Chy. 330; *Merchants' Bank v. Thompson*, 3 Ont. R. Chy. D. 541; *Pollock's Dig.*, p. 92 (3d ed.). Story on Part., §§ 232, 233 (7th ed.). Equity having obtained jurisdiction in a suit between partners to order the partnership articles cancelled, and restrain the use of the plaintiff's name, may administer complete relief by ordering defendant to repay the

In order to determine this point, it is necessary in the first place to ascertain whether the agreement for the premium was or was not tainted with fraud.

Premiums returnable in cases of fraud.—If a person has been deluded into becoming a partner by false and fraudulent representations, and has paid a premium, he may take one of two courses; viz., either abide by the contract and claim compensation for the loss occasioned by the fraud, which he may do in taking the partnership accounts; or he may disaffirm the contract, and thereby entitle himself to a return of the whole of the money he has paid (*e*). And *in [*65] a case of this sort in the event of the bankruptcy of the defrauding partner, the amount of the premium paid to him is a debt provable against his estate in competition with his separate creditors (*f*).

Return of premium where the consideration for it has failed.—But if the agreement by virtue of which the partnership was entered into, and the premium became payable, is not tainted by fraud, then the proper mode of dealing with the premium is not so easy to determine. In the first place, assuming the partnership to have been in fact created, it is clear that there has not been a *total* failure of consideration for the premium, and, consequently, it cannot be recovered as money paid for a consideration which has failed (*g*). In the next place, persons who enter into partnership know that it may be determined at any time by death and other events; and unless they provide against such contingencies, they may fairly be considered as content to take the chance of their happening, and the tendency of modern decisions is to act on this principle (*h*).

(*e*) See *infra*, pp. 65 *et seq.*; and as to rescinding for fraud, *infra*, book iii. c. 10.

(*f*) *Ex parte* Turquand, 2 M. D. & D. 339; and see *Bury v. Allen*, 1 Coll. 589. The case of *Ex parte* Broome, as reported in 1 Rose, 69, is opposed to this, but see on that case the note in 1 Coll. 598, and the obser-

ventions at the end of the judgment, *ib.* p. 607.

(*g*) See *Taylor v. Hare*, 1 Bos. & Pul. N. R. 260.

(*h*) *Whincup v. Hughes*, L. R. 6 C. P. 78; *Ferns v. Carr*, 28 Ch. D. 409. See, also, *Akhurst v. Jackson*, 1 Swanst. 85; *Bond v. Milbourn*, 20 W. R. 197.

sums advanced or expended by the plaintiff on account of the partnership. *Smith v. Everett*, 126 Mass. 304. Such relief will not affect the rights of third persons for debts incurred before the discovery of the fraud. *Tournade v. Hagedom*, 5 Th. & C. 288 (N. Y.). Such relief cannot be had in a court of law. *Capen v. Barrows*, 1 Gray, 376.

Apportionment of premium when partnership ceases sooner than was expected. — On the other hand, if a person receives a premium for taking another into partnership, which is to endure for a certain time, and then himself does anything which determines the partnership before that time has elapsed, he may be fairly considered as having precluded himself from insisting on his strict right to retain or be paid his whole premium. Moreover, where there has been no misconduct, a premium paid for a partnership for a term of years has been held apportionable in the event of a premature determination of the partnership by an unforeseen occurrence. The fact that the consideration for the premium has partially failed has been considered sufficient to render it inequitable to retain or obtain payment of the whole premium (*i*).

[*66] * The principles applicable to cases of this description are not even yet well settled; nor are the decisions upon them easy to reconcile.

The following rules are, however, submitted to the reader as guides on this subject: —

1. **Partnerships at will.** — Where a partnership is entered into for no specified time, and there is no agreement for a return or an apportionment of the premium in the event of an unexpected determination of the partnership, no part of the premium is returnable on the happening of such event. A case of fraud must be dealt with on its own demerits; and a person taking another into partnership for no definite time cannot, as soon as he has received the premium, dissolve the partnership and retain what has been paid as the consideration for it (*k*). But laying aside fraud, and supposing there to be nothing except a partnership created for no specified time and determined soon after its creation, it is difficult to hold that it was in fact entered into for a longer time, and that the person who came in, paying a premium, has not got all for which he stipulated (*l*).

(*i*) Similar views have been taken with respect to what is right in cases of a similar kind, arising on the death of a solicitor who has been paid a premium by an articulated clerk. See *Hirst v. Tolson*, 2 Mac. & G. 134; *Ex parte Bayley*, 9 B. & C. 691. But these cases have been since disapproved. See *Whincup v. Hughes*,

L. R. 6 C. P. 78, and *Ferns v. Carr*, 28 Ch. D. 409.

(*k*) *Featherstonhaugh v. Turner*, 25 Beav. 382. See, also, *Hamil v. Stokes*, Dan. 20, and *Burdon v. Barkus*, 4 De G. F. & J. 42, *per* L. J. Turner.

(*l*) See *per* Lord Eldon in *Tattersall v. Groot*, 2 Bos. & P. 134.

2. **Partnerships for a time.** — Where a partnership is entered into for a specified time, and is determined prematurely, the first matter for consideration is whether the parties have come to any agreement on the dissolution.

Agreements to dissolve. — If they have, and if they have also provided for the premium, it must be dealt with according to the agreement: but if the agreement on dissolution is silent with respect to the premium, the inference is that the parties did not intend to deal with it, nor to vary their rights to it under the original agreement for its payment (*m*).

* Where, however, no agreement is come to on the [*67] dissolution, then the cause of dissolution must be considered.

Premature termination. (*a*) **By death.** — Death is a contingency which all persons entering into partnership know may unexpectedly put an end to it. If, therefore, they do not expressly guard against this risk, they may reasonably be treated as content to incur it; and if death should unexpectedly happen, no return of premium not expressly provided for can, it is apprehended, be demanded (*n*). But even in this case, if a person knows himself to be in a dangerous state of health, and conceals that fact, and induces another to enter into partnership with him, and to pay him a premium, and shortly afterwards dies, the fraud so practised will entitle the partner paying the premium to a return of part of it; and he can obtain such return in an action for a partnership account; he need not rescind the contract *in toto* (*o*).

(*b*) **By bankruptcy.** — Bankruptcy of the partnership as distinguished from the bankruptcy of one of the partners cannot, it is apprehended, be a ground for apportioning a premium; for it is a contingency which every one may fairly be taken as contemplating (*p*). But the bankruptcy of a partner receiving a premium is a ground for its apportionment if he was embarrassed when the partnership com-

(*m*) See *Lee v. Page*, 30 L. J. Ch. 857, and 7 Jur. N. S. 768. A mere consent to dissolve may leave all questions of this sort open, as in *Astle v. Wright*, 23 Beav. 77; *Wilson v. Johnstone*, 16 Eq. 606; *Bury v. Allen*, 1 Coll. 589.

(*n*) See *Whincup v. Hughes*, L. R. 6 C. P. 78; *Ferns v. Carr*, 28 Ch. D. 409.

(*o*) *Mackenna v. Parkes*, 36 L. J. Ch. 366, and 15 W. R. 217.

(*p*) See *Akhurst v. Jackson*, 1 Swanst. 25.

menced, and this fact was not known to his co-partner (*q*); but not if it was (*r*). What the effect would be if he became embarrassed after the commencement of the partnership has not been decided. The bankruptcy of the partner paying the premium cannot entitle him or his trustee to a return of any part of it; unless he has been made bankrupt by his co-partner who has received the premium (*s*).

(*c*.) **Lunacy.**—The lunacy of a partner causing a dissolution would perhaps be considered as a ground for apportioning the premium.

[*68] * (*d*) **Disagreements.**—Disagreements between the partners resulting in a dissolution have given rise to much difficulty. The tendency of modern decisions is to apportion the premium in these cases not only where neither partner is to blame (*t*); but *a fortiori* where the partner receiving the premium has so misconducted himself as to give the partner paying it a right to have the partnership dissolved (*u*); and it matters not that the latter may himself not be altogether free from blame (*x*); nor is the rule altered by the fact that the partners have consented to dissolve since the institution of legal proceedings (*y*).

Misconduct.—But where a partner has paid or agreed to pay a premium, and has so misconducted himself as to induce the court to dissolve the partnership on that ground, he cannot recover any part of the premium if he has paid it, nor avoid paying it if it is due and it is still unpaid (*z*).

Wilson v. Johnstone.—In *Wilson v. Johnstone* (*a*), V.-C. Wickens held that the misconduct must be such as to amount to a complete repudiation of the contract of partnership; but

(*q*) *Freeland v. Stansfeld*, 2 Sm. & G. 479.

(*r*) *Akhurst v. Jackson*, 1 Swanst. 85.

(*s*) As in *Hamil v. Stokes*, Dan. 20, and 4 Price, 161. In this case it is to be observed that the contract of partnership was not rescinded on the ground of fraud.

(*t*) *Atwood v. Maude*, 3 Ch. 369.

(*u*) *Bullock v. Crockett*, 3 Giff. 507. See, also, *Rooke v. Nisbet*, 50 L. J. Ch. 588, where the party dissolving was in fault, and was the party to receive the premium.

(*x*) *Atwood v. Maude*, 3 Ch. 369,

where the partner paying the premium was plaintiff; *Astle v. Wright*, 23 Beav. 77; *Pease v. Hewitt*, 31 Beav. 22. Compare *Airey v. Borham*, 29 Beav. 620, where nothing was returned.

(*y*) *Bury v. Allen*, 1 Coll. 589; *Astle v. Wright*, 23 Beav. 77; *Wilson v. Johnstone*, 16 Eq. 606. Compare *Lee v. Page*, 7 Jur. N. S. 768, and 30 L. J. Ch. 857.

(*z*) See *Bluck v. Capstick*, 12 Ch. D. 863; *Wilson v. Johnstone*, 16 Eq. 606; *Airey v. Borham*, 29 Beav. 620; *Atwood v. Maude*, 3 Ch. 369.

(*a*) 16 Eq. 606.

he did not lay down any rule for determining what misconduct amounts to such a repudiation, and the statement in the text is in accordance with the latest decision on the subject (*b*).

3. **Amount to be returned.**— There is no definite rule for deciding in any particular case the amount which ought to be returned. The time for which the partnership was entered into, and the time for which it has in fact lasted, are the most important matters to be considered; but other circumstances must often be taken into *ac- [*69] count in order to decide what is fair between the parties (*c*). At the same time the rule generally adopted is to apportion the premium with reference to the agreed and actual duration of the partnership (*d*).

The proper time for obtaining the decision of the court upon the question whether any part of a premium is returnable or not, is the hearing of the action. An inquiry on this point will not be added afterwards except under special circumstances (*e*).¹

(*b*) *Bluck v. Capstick*, 12 Ch. D. 863.

(*c*) *Lyon v. Tweddell*, 17 Ch. D. 529, which shows that the court has a wide discretion in this matter.

(*d*) See *Wilson v. Johnstone*, 16 Eq. 606; *Atwood v. Maude*, 3 Ch. 369; *Bury v. Allen*, 1 Coll. 589;

Astle v. Wright, 23 Beav. 77; *Pease v. Hewitt*, 31 Beav. 32. Compare *Bullock v. Crockett*, 3 Giff. 507; *Freeland v. Stansfeld*, 1 Sm. & G. 479; *Hamil v. Stokes*, Dan. 20, where this rule was not adhered to.

(*e*) *Edmunds v. Robinson*, 29 Ch. D. 170.

¹ See upon the subject of damages and rescission of contract for fraud Book III. Chap. 10, Sect. 5 (pp. 479 *et seq.*).

As to allowances to an in-coming partner in respect to misrepresentations by his co-partners, in regard to the liabilities of the concern before he joined it, see *Davidson v. Thirkell*, 3 Ont. Ch. 330. See also *Duff v. Maguire*, 99 Mass. 300; *Smith v. Everett*, 126 Mass. 304; *Ward v. Brigham*, 127 Mass. 27; *Richards v. Todd*, *id.* 167; *Perry v. Hall*, 143 Mass. 540.

[*70]

* CHAPTER III.

OF THE PERSONS CAPABLE OF ENTERING INTO PARTNERSHIP.

THE parties to a contract of partnership may be considered with reference to

1. Their number.
2. Their capacity.

SECTION I.—OF THE NUMBER OF PARTNERS.

Number of partners.—By the common law of this country there is no limit to the number of persons who may be associated together in partnership (*a*).¹

Statutes regulating the number of persons who may be partners.—But from time to time various statutes have been passed, declaring that certain partnerships shall be either altogether illegal, or, at all events, deprived of some important rights, or exposed to serious penalties, if their members exceed a prescribed number. Of these statutes the Companies act, 1862, is the only one of present practical importance. This act, by § 4, limits the greatest number of persons who can carry on business as partners otherwise than under its provisions to ten, if the business is that of bankers, and to twenty in other cases (*b*). But this enactment does not apply to partnerships formed before the 2d November, 1862 (see § 2), nor to those formed in pursuance of some other act of Parliament, or of letters patent, nor to companies engaged in working mines within and subject to the jurisdiction of the Stannaries.

(*a*) As to the supposed illegality of partnerships so large as to be incapable of practically suing and being sued, see the vol. on Companies.

(*b*) See on this subject the vol. on Companies.

¹ See chapter on Joint-Stock Companies, pp. 757 *et seq.*

All the other statutes relating to this subject, except the Banking act of 7 Geo. IV. c. 46, have been repealed (*c*); and *although that act is still in force, no partnership or company can now be formed under it. [71] That act limited the number of persons who could lawfully carry on business as bankers in partnership and issue notes (except under certain restrictions), to six (*d*).

SECTION II.—OF THE CAPACITY OF PARTNERS.

Persons who cannot be partners.—By the law of this country, a valid contract of partnership can be entered into between any persons who are not under the disabilities of minority or unsoundness of mind, and are not convicts within the meaning of 33 & 34 Vict. c. 23. As will be seen hereafter, when treating of illegal partnerships, there are certain trades, businesses, and professions, which cannot be lawfully carried on, either solely or in partnership, unless some statutory requisite has been complied with: but now that the disabilities under which spiritual persons formerly lay have been removed (*e*), the writer is not aware that there is any class of persons (except convicts), who, being of sound mind, and over twenty-one, are rendered incapable of becoming members of a partnership. Married women may be partners, as will appear later on.

Agreements entered into between several persons, some of whom are by law incompetent to contract, are not wholly null and void, but are only in some respects less effective than if all the parties to them were competent. Hence there is nothing to prevent a person who is not *sui juris* from being a partner. But if any such person is a partner, his or her want of capacity to contract will necessarily give rise to consequences deserving special notice. These may

(*c*) A list of them will be found in the 2d edit. of this treatise, vol. i. p. 82.

(*d*) See on this subject, *infra*, book i. c. 5, § 1.

(*e*) **Clergy.**—The law relating to the clergy is now 1 & 2 Vict. c. 106, §§ 29–31, and 4 Vict. c. 14. Although a violation of those laws is attended with the risk of suspension and de-

privation, it is expressly enacted that contracts entered into contrary to them shall not be void (see *Lewis v. Bright*, 4 E. & B. 917). Consequently the disability under which the clergy formerly lay, and which rendered all partnerships and companies of which they were *de facto* members, illegal (*Hall v. Franklin*, 3 M. & W. 259), exists no longer.

be considered as they affect, 1, aliens; 2, felons and outlaws; 3, infants; 4, lunatics; 5, married women; and 6, corporations and companies.

[*72]

*1. *Aliens.*

Alien friends. — There is nothing to prevent an alien, not an enemy, from being a partner (*f*). But a public minister of a foreign state, accredited to and received by the Queen, cannot be sued here even in respect of commercial transactions in which he may have engaged (*g*).

Alien enemies stand in a very different position from alien friends.¹

Effects of war on the rights of partners. — When two supreme powers are at war, all persons who, for the time being, are the subjects of either, become in contemplation of the civil tribunals of both, hostile to the subjects of the other; and so long as the war lasts the subjects for the time being of the one country are incapable of entering into any valid contract with the subjects of the other; and all remedies available for the one against the other, in respect of transactions before the war, are suspended (*h*). Consequently no partnership can subsist between the sub-

(*f*) Co. Lit. 129 *b*; Bac. Ab. Alien, D. See, generally, as to aliens, 33 Viet. c. 14.

(*g*) Taylor *v.* Best, 14 C. B. 487; Magdalena Steam Nav. Co. *v.* Martin, 2 E. & E. 94.

(*h*) Albrecht *v.* Sussmann, 2 V. & B. 323; Willison *v.* Patteson, 7 Taunt. 440; *Ex parte* Boussmaker, 13 Ves. 71; Potts *v.* Bell, 8 T. R. 548. See the note to Clementson *v.* Blessig, 11 Ex. 141.

¹ N. Y. Life Ins. Co. *v.* Statham, 93 U. S. 24; Kershaw *v.* Kelsey, 100 Mass. 561 (1868) Gray, J.; Cohen *v.* N. Y. Life Ins. Co., 50 N. Y. 610; Woods *v.* Wilder, 43 N. Y. 164; Mut. Ben. Life Ins. Co. *v.* Hildyard, 37 N. J. L. 444.

The decision in Griswold *v.* Waddington, 16 Johns. 438, is by Mr. Chancellor Kent, and exhausts the subject. Kershaw *v.* Kelsey, *supra*, is a case of a lease of a plantation in rebel territory by a citizen and resident thereof to a citizen of Massachusetts during the Civil War, and the decision by Judge Gray cites some fifty cases and many authorities. The Rapid, 8 Cranch, 155; Scholefield *v.* Eichelberger, 7 Pet. 585; The San José, 2 Gall. 268; The Indian Chief, 3 Rob. 22; The Jonge Pieter, 4 id. 79; The Franklin, 6 id. 127; The Julia, 8 Cranch, 181.

Chap. 340, Acts of 49th Congress of United States, approved March 3, 1887, restrains aliens from acquiring lands in the Territories and District of Columbia. By this Act, Sect. 2, no corporation or association, more than twenty per cent of the stock of which is or may be owned by persons not citizens of the United States, shall hereafter acquire, or hold, or own any real estate hereafter acquired in any of the Territories of the United States or District of Columbia. The penalty provided (Sect. 4) is forfeiture to the United States.

jects of hostile powers (*i*); and if two partners are resident in two different countries, their partnership is determined by a war between those countries (*k*).

These doctrines, however, are only recognised and enforced by the belligerent powers. Neutrals do not apply them to the determination of commercial questions arising between the subjects of belligerent states.

It is to be remembered that whether a person is or is not to be considered as an enemy depends, not on whether there is war between this country and his native land, but upon whether *there is war between this country [*73] and the country in which he is voluntarily resident. It is the place of his residence or trading, and not the place of his birth, which is of importance in these matters (*l*): and, therefore, if a foreigner comes over here, enters into partnership here, and dwells here, and then war breaks out between this country and that of which he is a native, the partnership will not, nor will his rights as a partner, be affected by the war, any more than if he were an Englishman (*m*). On the other hand, if a partnership consists wholly of Englishmen, some of whom reside here and some in another country, and war breaks out between that country and this, the partners become enemies for all purposes of trade and commerce, just as much as if those abroad were natives of the country in which they reside (*n*). The same is true, even in the absence of any fixed residence in the belligerent country, if some of the partners go over there and trade there during the war (*o*).

(*i*) See *Evans v. Richardson*, 3 Mer. 469; and *infra*, the chapter on dissolution.

(*k*) See *Griswold v. Waddington*, 15 John. 57, and 16 ib. 438 (Amer.). Whether peace operates retrospectively, see *New York Life Ins. Co. v. Statham*, 3 Otto, 24 (Amer.); and *Parsons on Part. c. 3, §§ 1, 3*.

(*l*) See *Albrectht v. Sussmann*, 2 V. & B. 323; *Willison v. Patteson*, 7 Taunt. 440; *Houriet v. Morris*, 3 Camp. 303; *Bell v. Reid*, 1 M. & S. 726.

(*m*) See *Wells v. Williams*, 1 Ld.

Raymond, 282, and 1 Salk. 46, in which it was held that a plea of alien enemy was no defence to an action brought by a foreigner domiciled here, though there was war between his country and this.

(*n*) See *M'Connell v. Hector*, 3 Bos. & P. 113; *O'Mealey v. Wilson*, 1 Camp. 482, and compare *Roberts v. Hardy*, 3 M. & S. 533, and *Ex parte Baglehole*, 18 Ves. 525, and 1 Rose, 271.

(*o*) See *The Yonge Klassina*, 5 Ch. Rob. 303; *The Indian Chief*, 3 ib. 12; *The Portland*, ib. 41.

2. *Felons and outlaws.*

Felons and outlaws. — Formerly a felon's or outlaw's share in a partnership vested in the Crown (*p*); and although a felon or outlaw could contract, he could not sue in his own right until his disability had been removed; *i.e.* in the case of felony until pardon or expiration of the term of punishment; and in case of outlawry, until its reversal (*q*). But no person could plead his own attainder or outlawry as a defence to an action against him (*r*). As regards out-
 [*74] laws, the law in these respects * remains unchanged; the law, however, respecting felons was materially altered by 33 & 34 Viet. c. 23. This act abolished forfeiture for felony (*s*), and empowers the Crown to commit the custody and management of the property of any convict (*i.e.* a person sentenced to death or penal servitude (*t*)) to an administrator (*u*), in whom all the convict's property, both real and personal, then becomes vested (*x*). Moreover, a convict is absolutely disabled from alienating any property or making any contracts, and from suing (*y*), except when lawfully at large under a proper licence (*z*). Provision is also made for the appointment of an interim curator of a convict's property (*a*). Practically this act facilitates the dissolution and winding-up of a partnership in the event of a member being convicted of felony: but it is unnecessary to allude further to this statute in the present place.

3. *Infants.*

Infant partners. — An infant may be a partner. But, speaking generally, whilst he is an infant he incurs no liability and is not responsible for the debts of the firm: and when he comes of age, or even before, he may, if he chooses, disaffirm past transactions (*h*).¹

(*p*) Bac. Ab. Felony and Outlawry; Co. Lit. 128.

(*q*) *Ibid.*, and see Bullock *v.* Dodds, 2 B. & A. 258.

(*r*) Foster's Cr. L. 61.

(*s*) § 1.

(*t*) § 6.

(*u*) § 9.

(*x*) § 10.

(*y*) § 8.

(*z*) § 30.

(*a*) § 21 *et seq.*

(*h*) See Goode *v.* Harrison, 5 B. & A. 157-9; *Ex parte* Taylor, 8 De G. M. & G. 254.

¹ An infant's partnership agreement is voidable — not void. Osburn *v.* Farr, 42 Mich. 134; Dunton *v.* Brown, 31 Mich. 182; Stein *v.* Robertson, 30

The irresponsibility of an infant for the debts of a partnership of which he is a member is an obvious consequence of

Ala. 286; *Dana v. Stearns*, 3 Cush. 372; *Woods v. Woods*, 3 Man. 33; *Murphy v. Yeomans*, 29 Ont. C. P. 421.

Their natural tutrix cannot make minor heirs members of a partnership with herself and others, and at her death they can sue for and recover of surviving partners a debt due them by the partnership, without being postponed to a settlement and liquidation of the partnership affairs. *Cuillé v. Gassen*, 14 La. Ann. 5.

Judgment and execution obtained against a firm of which one member is a minor was stayed on showing that the minor had received no proper notice of the proceedings. *Van Syckle v. Rorback*, 6 N. J. Eq. 234; *Young v. Huber*, 29 Ont. Chy. 49; see *Mason v. Denison*, 11 Wend. 612; s. c. 15 Wend. 64.

M., W. & Co. were a firm under partnership articles dated March 31, 1882, consisting of D. G. M., A. W., and W. J. O. March 2, 1883, another partnership was formed under same name, consisting of D. G. M., A. W., and J. O., an infant, and the articles were signed by all three members. A few days later, March 20, 1883, the firm of W., O. & Co. was formed under written articles, and was to consist of A. W., W. J. O., E. O., and J. O., the last being still an infant, and there was no evidence of any ratification by her of the contract after she attained her majority, which was May 6, 1883. On the contrary, there was evidence that she then refused to sign the articles on being requested.

D. G. M., on March 30, 1883, conveyed the factory in which the partnership business was conducted to A. W. and J. O., but J. O. was not shown to have known of this conveyance. J. O. drew money from the concern on several occasions after this suit was instituted involving the partnership, but it did not appear whether she got it on her own account, or on her husband's, or that she expected it to be charged to her. Held that she was not liable as partner. *Woods v. Woods*, 3 Manitoba, 33.

What constitutes an affirmance or disaffirmance. *Tobey v. Wood*, 123 Mass. 88; *Todd v. Clapp*, 118 Mass. 495; *Keegan v. Cox*, 116 Mass. 289; *Minock v. Shortridge*, 21 Mich. 304; *Drake v. Ramsay*, 5 Ohio, 252; *Wallace v. Lewis*, 4 Harr. (Del.) 75.

Refusal to pay the particular debt will not avail against a general affirmance of the partnership contract. *Miller v. Sims*, 2 Hill (S. C.) 479.

Ratification of a dissolution effected during minority is not a ratification of the partnership so as to create a liability for the partnership debts. *Dana v. Stearns*, 3 Cush. 372.

If minor held himself out as a partner, he will be liable for partnership debts incurred after he attained twenty-one, unless when he comes of age he expressly disaffirm the partnership. *Simpson on Infants*, p. 45.

Where he holds himself out as a partner he must do some distinct act in avoidance at or soon after twenty-one, or he will be held to be bound by acquiescence. *Ib.* p. 71.

In Iowa, Kansas, and Washington, by statute, the minor cannot disaffirm when the other party had good reason, by the minor's own misrepresentations or from his having engaged in business like an adult, to believe that he was of full age; but generally he is allowed to disaffirm notwithstanding his own false and fraudulent declaration. *Burley v. Russell*, 10 N. H. 184; *Fitts v. Hall*, 9 N. H. 441; *Conroe v. Birdsall*, 1 John. Cas. 127; *Merriam v. Cunningham*, 11 Cush. 40; *Tobey v. Wood*, 123 Mass. 88; *Curtin v. Patton*, 11 S. & R. 305; *Brown v. McCune*, 5 Sandf. 224; *Ferguson v. Bobo*, 54 Miss. 121; *Carpenter v. Carpenter*, 45 Ind. 142.

But see *Kemp v. Cook*, 18 Md. 130, where it was held that if an infant

his general incapacity to bind himself by contract, and does not require to be supported by any special authority (*c*). It might, perhaps, be thought that an infant who held himself out as a partner would be liable to persons trusting to his representations if they did not know him to be under age;

but this is not so (*d*); and as an infant is not responsible for the torts of *his agent, an infant partner cannot be held liable for the misconduct of his co-partners. The irresponsibility of an infant as a partner, seems therefore to be complete, except in cases of fraud.

But an infant who was guilty of fraud was not so free from liability in equity as he was at law (*e*); and equitable as distinguished from legal relief, *e.g.*, rescission of contract, may be obtained against him (*f*). In accordance with these principles, although, as a rule, an infant cannot be made bankrupt (*g*); yet if he fraudulently represents himself as of age, and obtains credit by his false representations, and is made bankrupt, the adjudication against him will not be

(*c*) *Chandler v. Parkes*, 3 Esp. 76; *Jaffray v. Frebain*, 5 ib. 47; *Gibbs v. Merrill*, 3 Taunt. 307; and *Burgess v. Merrill*, 4 ib. 468, show that an infant partner ought not to be joined as a defendant in an action against the firm.

(*d*) See *Price v. Hewitt*, 8 Ex. 146; *Johnson v. Pye*, Vin. Ab. Infant, H. 2, pl. 16; *Glossop v. Colman*, 1

Stark. 25; *Green v. Greenbank*, 2 Marsh. 485.

(*e*) See *Wright v. Snowe*, 2 De G. & S. 321.

(*f*) *Lempriere v. Lange*, 12 Ch. D. 675.

(*g*) *Ex parte Jones*, 18 Ch. D. 109; *Ex parte Henderson*, 4 Ves. 163; *Ex parte Lees*, 1 Deac. 705; *Belton v. Hodges*, 9 Bing. 365.

forms a partnership with an adult, he holds himself forth to the world as not being an infant, and is guilty of fraud.

Where an infant having come of age and entered into a partnership, took from his grantor for his firm a lease of property which he had conveyed while an infant, it was held that the lease should go to the jury in an action by the infant for other parts of the property, as evidence of an affirmation of the deed for the whole. *Irvine v. Irvine*, 9 Wall. 617.

Disaffirmance must be within a reasonable time, and what is a reasonable time is to be decided according to the circumstances of each case. *Jenkins v. Jenkins*, 12 Iowa, 195; *Wright v. Germain*, 21 Iowa, 585; *Jones v. Jones*, 46 Iowa, 766; *Hoover v. Kinsey Plow Co.*, 55 Iowa, 668; *Green v. Wilding*, 59 Iowa, 679; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468; *Woods v. Woods*, 3 Man. 33; *Hartman v. Kendall*, 4 Ind. 403; *Kline v. Beebe*, 6 Conn. 494; *Featherston v. McDonell*, 15 Ont. C. P. 162; *Tobey v. Wood*, *supra*.

Infant is presumed to know his rights. *Taft v. Sergeant*, 18 Barb. 320; *Morse v. Wheeler*, 4 Allen, 570.

Infant may disaffirm before coming of age, as well as within a reasonable time after, notwithstanding Code 2238, Iowa. *Murphy v. Johnson*, 45 Iowa, 57; *Childs v. Dobbins*, 55 Iowa, 205.

An infant's voidable contract of partnership cannot be avoided by him until he becomes of age. *Dunton v. Brown*, 31 Mich. 182.

superseded, and his deceived creditors will be paid out of his estate (*h*).

Repudiation by Infant.—Moreover, notwithstanding the general irresponsibility of an infant, he cannot, as against his co-partners, insist that in taking the partnership accounts he shall be credited with profits, and not be debited with losses.¹ The infant partner must either repudiate or abide by the agreement under which alone he is entitled to any share of the profits (*i*).

Time for avoidance of infant's contract.—An infant partner may avoid the contract into which he has entered, either before or within a reasonable time after he has come of age (*k*). If he avoids the contract, and has derived no benefit from it, he is entitled to recover back any money paid by him in part performance of it (*l*); but he cannot do this if he has already obtained advantages under the contract, and cannot restore the party contracting with him to the same position as if no contract had been entered into (*m*).

* **Ratification by infant of his contract.**—If, when [*76] an infant partner comes of age, he is desirous of retiring from the firm, he should express his determination speedily and unequivocally. It is true that by the Infants' Relief Act, 1874 (*n*), promises made by a person who has attained twenty-one to pay debts contracted before that age cannot be enforced; but a person who retains a share in a

(*h*) See *Ex parte* Watson, 16 Ves. 265; *Ex parte* Bates, 2 M. D. & D. 337; *Ex parte* Unity Banking Assoc., 3 De G. & J. 63.

(*i*) See *Lon. & N. W. Rail. Co. v. McMichael*, 5 Ex. 114, and other cases of that class, in the vol. on Companies.

(*k*) *Co. Lit.* 380 *b*. *Newry & Enniskillen Rail. Co. v. Coombe*, 3 Ex.

565; *Dublin & Wicklow Rail. Co. v. Black*, 8 Ex. 181.

(*l*) *Corpe v. Overton*, 10 Bing. 253.

(*m*) *Holmes v. Blogg*, 8 Taunt. 508; *Ex parte* Taylor, 8 De G. M. & G. 254. Compare *Mann's case*, 3 Ch. 459, and *Curtis's case*, 6 Eq. 455, where the infant had sold some shares, but not the rest.

(*n*) 37 & 38 Vict. c. 62, § 2.

¹ The infant's ratification or avoidance must be complete. *Miller v. Sims*, 2 Hill. 479 (So. Car.); *Dana v. Stearns*, 3 Cush. 372. The privilege of avoidance is strictly personal to the infant or his privies in blood or estate, and cannot be availed of by an adult with whom he deals. *Field's Law of Infants*, etc. (1888), p. 8; *Hastings v. Dollarhide*, 24 Cal. 195.

Emancipation of Infant.—In several states (Alabama, Arkansas, Dakota, Kansas, Louisiana, Mississippi and Texas) there is a process by which any minor may obtain a decree of court, rendering him of age for all purposes of property and contract. An indebted or insolvent father's consent to his minor son's becoming a partner is a release of the son's services. *Penn v. Whitehead*, 17 Gratt. 503.

partnership cannot retain it without its incidental obligations (*o*); and the doctrine of holding out, is itself sufficient to impose liability upon an adult, although he may not long have attained his majority.

Holding out after attaining twenty-one. — This is well exemplified in *Goode v. Harrison* (*p*). There an infant was a member of a firm, and he was known to be a member. After he had attained twenty-one, he did not expressly either affirm or disaffirm the partnership. He was held liable for debts incurred by his co-partners subsequently to that time. A person who, before he comes of age, represents himself as a partner, must, when he comes of age, take care to notify that he has ceased to be a partner if he desires to avoid liability.

4. Lunatics.

Lunatic partners. — If a lunatic enters into a contract with a person who acts *bonâ fide*, and who does not know of the incapacity under which the lunatic labours, the lunatic is so far bound by the contract, that if it has been executed he cannot avoid it (*q*). So if a person *bonâ fide* contracts with a lunatic, without knowing him to be so, and performs the contract, lunacy affords no defence to an action for remuneration for what has been done (*r*). It is not, therefore, possible to lay down as a universal proposition that contracts entered into by persons who are lunatic are void, nor consequently that such persons are incapable of being partners.¹

(*o*) See *Lon. & N. W. Rail. Co. v. McMichael*, 5 Ex. 114; *Cork & Bandon Rail. Co. v. Cazenove*, 10 Q. B. 935, *per Coleridge* and *Erle, JJ.*; *Ebbett's case*, 5 Ch. 302. Compare *Baker's case*, 7 Ch. 115.

(*p*) 5 B. & A. 147.

(*q*) See *Molton v. Camroux*, 2 Ex.

487, and 4 ib. 17; *Beavan v. McDonnell*, 9 ib. 309, and 10 ib. 184.

(*r*) See *Drew v. Nunn*, 4 Q. B. D. 661; *Baxter v. The Earl of Portsmouth*, 5 B. & C. 170; *Brown v. Jodrell*, 3 C. & P. 30. See, as to the onus of proof where the lunatic has been so found by inquisition, *Snook v. Watts*, 11 Beav. 107.

¹ A lunatic may be a partner. Story on Part. § 7, n. 1 (7th ed.). *Ibid.* §§ 295–297; *Creswick v. Creswick*, 4 A. J. R. 23, 93 (Victoria). That a lunatic may avoid his contract, though the contract is executed: *Farnam v. Brooks*, 9 Pick. 212; *Seaver v. Phelps*, 11 Pick. 304; *Leonard v. Leonard*, 14 Pick. 280. That he is bound so far as the contract has been executed: *McCormick v. Littler*, 85 Ill. 62; *Ballard v. McKenna*, 4 Rich. Eq. 358; *Person v. Warner*, 14 Barb. 488, and cases cited; *Wilder v. Weakley*, 34 Ind. 81; *Young v. Stevens*, 48 N. H. 133. That insanity does not, *per se*, work a disso-

* Any doubt, however, which might exist upon this [*77] subject in point of principle is removed by those decisions which have settled that an existing partnership is not dissolved by the mere fact that one of its members has become lunatic, and that, notwithstanding his lunacy, he is entitled to share the profits made subsequently by his co-partners (*s*). To these authorities, which will be examined hereafter, may be added the case of *Sadler v. Lee* (*t*), in which it was held that if a member of a going partnership becomes imbecile, he is nevertheless responsible for the subsequent misconduct of the other members. It seems, therefore, that by the law of this country, a lunatic is capable of being a partner: but all dealings and transactions with him when his lunacy is known are liable to be impeached.

5. *Married women*.¹

Married women partners. — A married woman who has no separate estate is incapacitated from entering into any con-

(*s*) *Jones v. Noy*, 2 M. & K. 125.

(*t*) 6 Beav. 324.

lution: *Raymond v. Vaughan*, 17 Ill. App. 144; *Reynold v. Austin*, 4 Del. Ch. 24; *Griswold v. Waddington*, 15 Johns. 57; *Gregory v. Welch*, 2 Victorian R. Eq. 129; *Re Anderson*, 4 Victorian L. R. Eq. 103; *Re Joseph Wilkie*, 3 A. J. R. 12 (Victoria). That it does: *Isler v. Baker*, 6 Humph. (Tenn.) 85; *Griswold v. Waddington*, 15 Johns. 57; *Davis v. Lane*, 10 N. H. 161; *Cape Sable Co. v. Case*, 3 Bland. 606; *Story on Part.* § 296.

¹ The "community" of husband and wife is a species of partnership. *Packard v. Arellanes*, 17 Cal. 537. Such community was a partnership under Mexican law. *Fuller v. Ferguson*, 26 Cal. 547.

A wife cannot form a valid partnership with her husband under a power given her by statute to carry on business on her sole and separate account. *Haas v. Shaw*, 91 Ind. 384; s. c. 46 Am. Rep. 607.

Married woman living with her husband may not form a mercantile partnership with others so as to subject her separate estate at law to its obligations. *Carey v. Burruss*, 20 W. Va. 571; s. c. 43 Am. Rep. 790; *Radford v. Carwile*, 13 W. Va. 572.

In a few states, the wife is by statute at liberty to contract with third persons as if she were sole, — New Hampshire, Massachusetts, Vermont, New York, New Jersey, Indiana, Illinois, Iowa, Minnesota, Oregon, Colorado, Mississippi, and New Mexico, — except that in Illinois she may not enter into a partnership without her husband's consent, unless he has deserted her or is idiotic, or insane, or confined in the penitentiary.

In some states the legal incapacity is only partially removed; in others wholly. It is wholly removed in Maine, by Acts of 1866, c. 52. *Mayo v. Hutchinson*, 57 Me. 546.

In Mississippi, by Code of 1880, c. 42, § 1167, "the Common Law as to the disability of married women is totally abrogated." *Howard v. Stephens*, 52 Miss. 239; *Newman v. Morris*, 52 Miss. 402.

tract binding on herself (*u*) except 1, when the husband is a convicted felon (*x*); 2, when the husband and wife are

(*u*) *Marshall v. Rutton*, 8 T. R. 545. (*x*) See *Ex parte Franks*, 7 Bing. 762.

And in Pennsylvania. *Silveus v. Porter*, 74 Penn. St. 448.

But not in Texas, even with her husband's consent. *Miller v. Marx*, 65 Tex. 131; *Bradford v. Johnson*, 44 Tex. 381; *Brown v. Chancellor*, 61 Tex. 437; *Tibbatts v. Tibbatts*, 6 McLean, 80.

She cannot as partner with her husband make herself liable to third persons. *Montgomery v. Sprinkle*, 31 Ind. 113; *Wallace v. Finberg*, 46 Tex. 35.

If the partnership is entered with husband's consent and does not relate to wife's separate property, it is the husband's partnership so far as his creditors are concerned. *Swasey v. Antram*, 24 Ohio St. 87.

Where a woman held herself out to the public as partner, she is liable as such to creditors of the firm, and has the right as against her husband and her partner to be protected out of the share which would belong to her in her capacity as trustee for her husband, and can maintain a suit for a dissolution and an accounting against her co-partner. *Bitter v. Rathman*, 61 N. Y. 512.

In South Carolina married women were allowed to trade as *feme sole*, after the manner of the custom of London. *Wallace v. Rippon*, 2 Bay, 112; *Newbiggin v. Pillans*, id. 162; *Surtell v. Brailsford*, id. 333; *Ross v. Lindor*, 12 S. C. 594; *Long v. Schmidt*, 18 S. C. 604; *Reid v. Lamar*, 1 Strob. Eq. 27; *Witsell v. Charleston*, 7 S. C. 88; *Pilzer v. Campbell*, 15 S. C. 581; *Clinkseales v. Hall*, id. 602. The last two cases arose after the adoption of the Act of 1870, G. S. chap. C. § 3, p. 482.

In consequence of these decisions, the act was amended at the next session, so as to limit the wife's power to contract to contracts "as to her separate property." And *Habenicht v. Rawls*, 24 S. C. 465, construes this amendment to mean such contracts as *relate to*, have *reference to*, and are *intended to bind* her separate property.

Statutes which merely give the wife a separate legal estate instead of her former separate equitable estate, do not by implication invest her with the power to make contracts generally. *Carey v. Burruss*, 20 W. Va. 571; s. c. 43 Am. Rep. 790; *Stockton v. Farley*, 10 W. Va. 171; *Howe v. Wildes*, 34 Me. 566; *Yale v. Dederer*, 18 N. Y. 265; *Barnett v. Lechtenstein*, 39 Barb. 184; *Draper v. Stouvenel*, 35 N. Y. 507; *Ogden v. Blydenburgh*, 1 Hilton, 182; *Ballen v. Dillaye*, 37 N. Y. 35; *Switzer v. Valentine*, 4 Duer, 96; *Wooster v. Northrup*, 5 Wis. 245; *Jones v. Crosthwaite*, 17 Ia. 393; *Parker v. Lambert*, 29 Ala. 89; *O'Daily v. Morris*, 31 Ind. 111; *Fuller v. Bartlett*, 41 Me. 241; *Stevens v. Parish*, 29 Ind. 260; *Tracy v. Keith*, 11 Allen, 214; *Bauer v. Bauer*, 40 Mo. 61; *Pond v. Carpenter*, 12 Minn. 430; *Pollen v. James*, 45 Miss. 129; *Whipple v. Giles*, 55 N. H. 139; *Ames v. Foster*, 42 id. 321; *Johnson v. Cummins*, 16 N. J. Eq. 97; *Kavanaugh v. Brown*, 1 Tex. 481.

A reputed partnership consisting in fact of S. only, who was a married woman, can be sued as such; and the coverture of its members is no defence to the action, and S. is stopped to deny the partnership. *Le Grand v. Eufaula* N. Bk., 81 Ala. 123; s. c. 60 Am. Rep. 140.

In an action on a note signed "J. P. K. & Co.," F. M. K. alone answered, and her sole defence was that at the time stated she was a married woman, and that the note was executed and delivered by her husband; but there was no allegation that it was made without her knowledge and consent.

The note was given for the price of mirrors placed in houses built on her land, and unpaid for; and the consideration was delivered upon the representation by the husband that the wife was the sole owner of the property, and that the name of J. P. K. & Co. was used as a mere matter of convenience in transacting business. Plaintiff recovered. *Noel v. Kinney*, 106 N. Y. 74;

judicially separated (*y*); 3, where the wife is protected from her husband by an order obtained under the divorce acts (*z*); 4, when the husband is an alien enemy and abroad (*a*). In these cases the wife is as capable of contracting as if she were unmarried. By the custom of London, moreover, a married woman may be a trader, and contract, as if she were

(*y*) 20 & 21 Vict. c. 85, §§ 25, 26.

(*z*) 20 & 21 Vict. c. 85, § 21, and Raymd. 147; *Barden v. Keverberg*, 21 & 22 Vict. c. 108, §§ 6-10.

(*a*) *Derry v. Mazarine*, 1 Ld. 2 M. & W. 61.

s. c. 60 Am. Rep. 423; *Bitter v. Rathman*, 61 N. Y. 512; *Coleman v. Burr*, 93 N. Y. 17; s. c. 45 Am. Rep. 160; *Rogers v. Union Centl. Ins. Co.*, 111 Ind. 343; s. c. 60 Am. Rep. 701.

M. entered into a co-partnership under written articles with R. by which R. was to furnish capital to buy stock, tools, &c., with the assistance of M.'s husband, "who is to represent M. as her agent" and devote all his time and attention to said manufacturing; "and the said M., by her husband, is to draw at the rate of," &c. Held, that M. was bound by a settlement of the partnership affairs made by her husband. *Murphy v. Ross*, N. Y. Supt. Ct. Feb. 1887, 26 N. Y. Weekly Dig. 124; *Story on Partnership*, § 12, 7th edit.

In Massachusetts, a woman may be a member of a commercial partnership of which her husband is not a member. Pub. Stats. c. 147, §§ 1, 2, 3, 4, 10; *Plumer v. Lord*, 5 Allen, 460; s. c. 7 Allen, 481; s. c. 9 Allen, 455; *Lord v. Parker*, 3 Allen, 127; *Lord v. Davison*, id. 131; *Edward v. Stevens*, id. 315; *Fowle v. Torrey*, 135 Mass. 87 (dissent. op. JJ. Field and Allen); *Todd v. Clapp*, 118 Mass. 495; *Major v. Holmes*, 124 Mass. 108; *Kenworthy v. Sawyer*, 125 Mass. 28; *Goodnow v. Hill*, id. 588.

This coverture of members at time of contract may be put in evidence to defeat action against firm. *Brown v. Jewett*, 18 N. H. 230.

Under the laws of New York, the husband may lawfully use the firm name of J. Z. and Co., the "Co." representing the wife; and so doing does not offend the provisions of 1833, c. 281, requiring that "& Co." shall represent an actual partner. *Zunmer v. Erhard*, 58 How. Pr. 11.

Husband's civil death enables the wife to contract as *feme sole*. *Gregory v. Paul*, 15 Mass. 31; *Clancy on Married Women*, c. 4, 2 Kent, 154-164. Imprisonment for life is not civil death. *Willingham v. King*, Fla. Sup. Ct. 1887.

Woman living here whose husband has never been in this country may contract as *feme sole*. *Abbott v. Bayley*, 6 Pick. 89.

Other cases in which the powers of married women are considered are: *Howard v. Stephens*, 52 Miss. 239; *Rittenhouse v. Leigh*, 57 Miss. 697; *Howard v. Shaw*, 91 Ind. 384; s. c. 46 Am. Rep. 607; *Kitcher v. Williams*, 40 N. J. Eq. 436; *Mayo v. Hutchinson*, 57 Me. 547; *Derring v. Boyle*, 8 Kan. 529; *Wicks v. Mitchell*, 9 Kan. 88; *Manhattan Co. v. Thompson*, 58 N. Y. 84; *Rouillier v. Wernicki*, 3 E. D. Smith, 310; *Williams v. Urmston*, 35 Ohio St. 296; s. c. 35 Am. Rep. 611; *Wieman v. Anderson*, 42 Penn. St. 311; *Craig v. Chandler*, 6 Colorado, 543; *Merchants' Nat. Bk. v. Raymond*, 27 Wis. 569; *Atwood v. Meredith*, 37 Miss. 635; *Brasfield v. French*, 59 Miss. 632; *Dupny v. Sheak*, 57 Iowa, 361; *Bradstreet v. Baer*, 41 Md. 19; *Frank v. Anderson*, 13 Lea, 695 (Tenn.); *Edwards v. Thomas*, 66 Mo. 468.

No more noteworthy confusion "than the discordant and ever-shifting utterances of the judicial mind on the subject of the power of a married woman and her separate estate." 1 Bish. Married Wom. § 847. And the statutes of the several states differ to such an extent that nothing short of a careful examination of them will suffice in each case.

not married (*b*). Neglecting these exceptions, it seems clear that a married woman without separate estate, having no capacity to contract, cannot be a partner. She may however be the agent of other people, and bind them although not herself. Moreover, as in the case of infants, so in the case of married women having no separate estate, holding themselves out as partners does not subject them to the responsibilities which are incurred by other persons who act in a similar way (*c*).

[*78] * **Position of married women with separate estate.**—

But a married woman who has separate estate, which she is not restrained from anticipating, is as to such estate regarded as a *feme sole*: and debts and obligations incurred by her either expressly or impliedly on the credit of that estate can be enforced against it, although not against her personally (*d*). Supposing, therefore, that a married woman partner has such separate estate, it will be liable for the debts of the partnership; and to that extent she will be a partner (*e*). But her husband will not. A married woman having separate estate may lend money to her husband, but if lent to him for purposes of trade and he becomes bankrupt she is postponed to his other creditors (*f*); but a loan by her to a partnership of which her husband is a member is payable out of its assets like any other joint debt (*g*).

A married woman having separate property and carrying on business separately from her husband is liable to the bankruptcy laws (*h*). But her position, if she carries on business in partnership with him, is not defined. There is, however, no reason why she should not do so (*i*); her liability to the extent of her separate estate for his contracts and his liability for hers would, in such a case, be governed by the principles of agency (*k*).

(*b*) See as to this, *Beard v. Webb*, 2 Bos. & Pul. 93.

(*c*) See the *Liverpool Adelphi Loan Assoc. v. Fairhurst*, 9 Ex. 422.

(*d*) See 45 & 46 Vict. c. 75, §§ 1, 12, 19; *Re Shakespear*, 30 Ch. D. 169; *Palliser v. Gurney*, 19 Q. B. D. 519.

(*e*) See *Matthewman's case*, 3 Eq. 781, where she was held a contributory. See as to a married woman's separate trade, *Ashworth v. Outram*, 5 Ch. D. 923.

(*f*) 45 & 46 Vict. c. 75, § 3.

(*g*) *Ex parte Nottingham*, 19 Q. B. D. 88.

(*h*) 45 & 46 Vict. c. 75, § 1 (5); *Ex parte Gilchrist*, 17 Q. B. D. 521; *Ex parte Coulson*, 20 Q. B. D. 249.

(*i*) See *Butler v. Butler*, 16 Q. B. D. 374.

(*k*) A husband is liable for his wife's torts, *Seroka v. Kattenburg*, 17 Q. B. D. 177.

6. *Corporations and Companies.*¹

Corporations, &c., may be partners.—There is no general principle of law which prevents a corporation from being a partner with another corporation or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorised by its consti-

¹ Whether a corporation can be a member of a partnership. *Marine Bank v. Ogden*, 29 Ill. 248; *Angell & Ames on Corp'ns*, § 272; *Van Keuren v. Trenton Co.*, 2 Beasl. 302, 13 N. J. Eq. 302; *Conkling v. Washington University*, 2 Md. Ch. 497; *French v. Donohue*, 29 Minn. 111; *Bissell v. M. S. & N. I. R. R. Cos.*, 22 N. Y. 258; *Gunn v. Central R. R.*, 74 Ga. 509; *Railroad Co. v. Bixby*, 55 Vt. 235; *Catskill Bank v. Hooper*, 5 Gray, 574; *Catskill Bank v. Gray*, 14 Barb. 471, 582; *Jones v. Parker*, 29 N. H. 31; *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Ont. Chy. 540.

Where a manufacturing corporation and an individual had held themselves out as partners and had actually made a contract of partnership, it was held that the alleged firm could not be put into insolvency on the petition of the individual as a partnership,—that they were not partners *inter sese*. *Whittenton Mills v. Upton*, 10 Gray, 582; *Hanson v. Paige*, 3 Gray, 239.

A manufacturing corporation has no power to make a contract of partnership. *Whittenton Mills v. Upton*, 10 Gray, 582; *Commonwealth v. Smith*, 10 Allen, 448.

An agreement between a manufacturing company and an individual concerning a particular business was styled "a lease," but it stipulated for a fair rent which was to come only from the net profits of the business and not exceed a certain proportion of them. Held that they were in law partners. *Dalton City Co. v. Dalton M'fg Co. & al.*, 33 Ga. 243.

The charter of the J. & E. S. Company by necessary intendment authorized that corporation to constitute itself a member of the partnership known as the American Toy Company. *Butler v. American Toy Co.*, 46 Conn. 136. Dissenting opinion of J. J. Carpenter and Loomis.

The W. Co. was created a corporation by the legislature. Nothing in the act of incorporation specified the business to be done, nor did corporate name suggest it. All its stock was held by a single stockholder. It entered into a copartnership with A., to be terminated at will of corporation. Held, that the partnership was not *ultra vires*. *Allen v. Woonsocket Co.*, 11 R. I. 288.

A corporation can only be bound by the acts of its officers, and not by acts of a *partner*. *Hackett v. Multnomah R. R. Co.*, 12 Or. 124.

A railroad corporation cannot form a partnership with an individual unless specially authorized so to do by its charter. *Ledsinger v. Central Line Steamers*, 75 Ga. 567; *Gunn v. Central R. R. & B'k'g Co.*, 74 Ga. 509.

Pooling or running arrangements of railroads are sustained, as not being partnerships. *Hotsprings R. R. v. Trippe*, 42 Ark. 465; s. c. 48 Am. Rep. 65; *Pratt v. O. & L. C. R. R.*, 102 Mass. 557; *Briggs v. Vanderbilt*, 19 Barb. 222; *Converse v. N. & N. Y. Transp. Co.*, 33 Conn. 166.

One firm may be a partner with another firm. *In re Hamilton*, 1 Fed. Rep. 800; *Mallon v. Craig*, 3 Ont. Rep. Ch. D. 546; *Mullins v. Miller*, 1 Low. Can. J. 121; *Smith v. Wright*, 5 Sandford, 113; s. c. 1 Abbott, Pr. 243; *Bullock v. Hubbard*, 23 Cal. 495; *Raymond v. Putnam*, 44 N. H. 160; *Re Warner*, 7 Bankr. Reg. 47.

[*79] tution (*l*). Having regard, however, to this * principle, it may be considered as *primâ facie ultra vires* for an incorporated company to enter into partnership with other persons (*m*).

(*l*) See *Gill v. Manchester, Sheffield, &c. Rail. Co.*, L. R. 8 Q. B. 186, as to one company being the agent of another, if not its partner.

(*m*) See the American cases, *Sha-*

ron Coal Corp. v. Fulton Bank, 7 Wend. 412; *Catskill Bank v. Gray*, 14 Barb. 479. As to holding out, see *Holmes v. Old Colony R. R. Co.*, 5 Gray, 58.

* CHAPTER IV.

[*80]

OF THE EVIDENCE BY WHICH A PARTNERSHIP OR *QUASI*-
PARTNERSHIP MAY BE PROVED.

Evidence by which a partnership or quasi-partnership may be proved. — The contract of partnership is one of those which does not require to be entered into with any particular formalities. By the common law of this country, a partnership may be constituted without any official act, such as registry, without any instrument under seal, and even without any writing whatever; and this is the law at the present time, except so far as it has been altered by the Statute of Frauds, by the acts relating to marine insurance (*a*), and by the various statutes relating to companies. But although a partnership may be constituted without any deed or writing, still a person who has entered into a mere verbal agreement for a partnership with another, will not be able to sustain an action for its breach, unless he can prove the terms upon which the partnership was to be entered into (*b*).

Statute of Frauds. — The only statutory enactment applicable to ordinary partnerships is the Statute of Frauds, the 4th section of which enacts, amongst other things,

“That no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.”

Future partnerships, &c. — This enactment applies as well to an agreement for a partnership to commence more than a

(*a*) By 30 Vict. c. 23, § 7, agreements for marine insurance must be in writing and stamped; and a mutual marine insurance society

which infringes these enactments is an illegal society. See *infra*, book i. c. 5, § 1.

(*b*) *Figes v. Cutler*, 3 Stark. 139.

[*81] year from the date of the *agreement (*c*), as to an agreement for a present partnership to last more than a year from its commencement (*d*). But if in either case the parties have acted on the agreement and become partners, they must be treated as such, and the statute will not be applicable (*e*).

Partnerships in land.— With respect to that part of the 4th section of the Statute of Frauds which relates to lands, it is held, — 1, that a partnership constituted without writing is as valid as one constituted by writing (*f*); and 2, that if a partnership is proved to exist, then it may be shown by parol evidence that its property consists of land. This was first clearly laid down in *Forster v. Hale* (*g*), where a person attempted to obtain an account of the profits of a colliery on the ground that it was partnership property, and it was objected that there was no signed writing, such as the statute required. But to this the Lord Chancellor observed,

“That was not the question; it was whether there was a partnership. The subject being an agreement for land, the question then is whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are *by operation of law* held for the purposes of that partnership.”

The principle here stated was carried to its extreme limit by the Vice-Chancellor Wigram, in *Dale v. Hamilton* (*h*). He held that an agreement to form a partnership for the purpose of buying and selling land might be proved by parol; that it might then be shown by parol, that certain [*82] land had been *bought for the purposes of the partnership, and, consequently, that the plaintiff was

(*c*) See *per* Holroyd, J., in *Williams v. Jones*, 5 B. & C. 108.

(*d*) *Ibid.*; and see *Britain v. Rositer*, 11 Q. B. D. 123. But see as to this *McKay v. Rutherford*, 6 Moore, P. C. C. 414, and 13 Jur. 21.

(*e*) See *Baxter v. West*, 1 Dr. & Sm. 173, where the partners had acted on, and were held bound by, an un-

signed memorandum, continuing a partnership for seven years. See, also, *Williams v. Williams*, 2 Ch. 294, and *per* Turner, L. J., in *Burdon v. Barkus*, 4 De G. F. & J. 47.

(*f*) *Essex v. Essex*, 20 Beav. 449.

(*g*) 5 Ves. 309.

(*h*) 5 Ha. 369; s. c., on appeal, 2 Ph. 266.

entitled to a share of the profits obtained by its resale. The Vice-Chancellor directed an issue as to the fact of partnership, but his decision is an authority for the proposition that the Statute of Frauds does not preclude a person from establishing by parol an agreement to form a partnership for the purpose of buying and selling land at a profit (*i*).

This is certainly going a long way towards repealing the Statute of Frauds. *Dale v. Hamilton* was appealed from, and the plaintiff obtained a decree without any issue as to the fact of partnership.

Both in *Forster v. Hale* and in *Dale v. Hamilton*, there was a signed writing showing a trust in the plaintiff's favour; and this circumstance was relied on by Sir William Grant in the former case (*j*), and by Lord Cottenham in the latter (*k*); but, curiously enough, the signed writing was not made the foundation of the decision of Lord Rosslyn in *Forster v. Hale*, and was not considered sufficient by Vice-Chancellor Wigram in *Dale v. Hamilton*.

His decision is difficult to reconcile with sound principle, or with the more recent decision of *Caddick v. Skidmore* (*l*). There the plaintiff alleged that it had been agreed between him and the defendant, that they should become partners in a colliery and share the profits equally. The plaintiff sought to enforce that agreement. The defendant denied the alleged agreement, and asserted that the true agreement was that the plaintiff and the defendant should share the royalties obtained from the colliery. The defendant also set up the Statute of Frauds as an answer to the plaintiff's claim. In this case no partnership in fact was proved: and there was no agreement for a partnership as distinguished from the agreement to share the profits of the colliery in question. The terms of that agreement were not in writing and were in dispute. Under these circumstances the Statute of Frauds was properly held to be a defence to the action.

* **Part performance.** — In considering cases of this [*83] description the equitable doctrines of part performance must be borne in mind. They may enable a plaintiff to prove a parol agreement for sharing the profits arising from land notwithstanding the Statute of Frauds (*m*).

(*i*) See, too, *Cowell v. Watts*, 2 H. & Tw. 224.

(*j*) *Forster v. Hale*, 3 Ves. 696.

(*k*) *Dale v. Hamilton*, 2 Ph. 266.

(*l*) 2 De G. & J. 52.

(*m*) See *Cowell v. Watts*, 2 H. &

Question of partnership or no partnership, a mixed question of law and fact.—The question whether a partnership does or does not subsist between any particular persons is a mixed question of law and fact, and not a mere question of fact. If it comes before a jury the question must be decided by them; they, taking their own view of the effect of the evidence before them, are bound to apply to the facts established to their satisfaction, those legal principles which the Court may lay down for their guidance (*n*).¹

In considering the evidence which it is necessary to adduce in order to establish the existence of a partnership, two perfectly distinct questions immediately suggest themselves, viz.:—

1. What is to be proved?
2. How is it to be proved?

Tw. 224, where the plaintiff succeeded on this point, although by reason of his laches he failed to obtain a decree.

(*n*) See *Fox v. Clifton*, 9 Bing. 117. Formerly the Court of Chancery used to direct an issue to try a disputed question of partnership, or

¹ What constitutes a partnership is a question of law to be charged by the judge to the jury, leaving to the jury whether there is sufficient evidence to establish the facts so charged by the judge to be necessary to the existence of the partnership. It is an inference of law from the facts. *Dulany v. Elford*, 22 S. C. 308; *Dwinel v. Stone*, 30 Me. 384; *Gilpin v. Temple*, 4 Harr. 190 (Del.); *Everett v. Chapman*, 6 Conn. 347; *Doggett v. Jordan*, 2 Fla. 541; *Terrill v. Richards*, 1 Nott. & McCord, 20; *Drake v. Elwyn*, 1 Cai. 184, overruled 1 N. Y. 242; *McGrew v. Walker*, 17 Ala. 824; *Kingsbury v. Thorp*, 61 Mich. 216; *Bates, Partn.* § 1135.

In *McGrew v. Walker*, *supra*, it was held that a witness who knew the facts not as a mere opinion, might testify that the parties were partners.

When the question is a matter of doubt to be decided by inferences to be drawn, it is one of fact for the jury. *Butler v. Finck*, 21 Hun, 210; *McDuffie v. Bartlett*, 3 Penn. St. 317; *Smith v. Hollister*, 32 Vt. 695; *Dulany v. Elford*, 22 S. C. 308.

Sufficiency of proof varies with nature of demand and residence of the parties. *Pollok v. Cunard*, 2 Kerr, 291 (N. B.); *McPherson v. Hoskins*, 1 Kerr, 420 (N. B.); *Scullthope v. Bates*, 5 Ont. Q. B. 318.

To prove partnership *inter sese* requires stronger evidence than to prove partnership as to third persons. *Walker v. Matthews*, 58 Ill. 196; *Banchor v. Cilley*, 38 Me. 553; *Robinson v. Green*, 5 Harr. 115 (Del.); *Bates, Partn.* § 1136.

Partnership books are competent only in connection with other evidence tending to prove the partnership and that the partner sought to be charged had access to and knowledge of the books. *Bryce v. Joynt*, 63 Cal. 375; s. c. 49 Am. Rep. 94; *Frich v. Barbour*, 64 Penn. St. 120; *Shelmire's Appeal*, 70 Penn. St. 281.

In *Shelmire's Appeal*, *supra*, one partner bought the other's interest worth \$20,000 at sheriff's sale for \$110, and thereafter kept the books as before and divided the profits with him. Held, evidence of partnership in action for an account.

1. **What has to be proved in order to establish the existence of a partnership.** — With reference to the first question, the distinction between partnerships and *quasi*-partnerships is all-important; for it by no means follows, that persons who are not partners are not liable as if they were; nor does it follow that persons who are liable as if they were partners are partners in reality. This has been already explained: and, in fact, the answer to the first of the above two questions will be found in that portion of the present work in which the nature of the contract of partnership was discussed (*o*).

Proof of such a state of things as is sufficient to establish a *quasi*-partnership is *primâ facie* evidence of a real * partnership (*p*), but evidence which is insufficient [*84] to establish a *quasi*-partnership must, *a fortiori*, fail to establish a real partnership between the same persons.

Sharing profits is only evidence of *quasi*-partnership where agency may be inferred, and where the recent act 28 & 29 Vict. c. 86 does not apply (*q*).

The distinction between existing and contemplated partnerships must not be overlooked: and it is obvious that if in attempting to establish a *quasi*-partnership, a real partnership should be shown to exist, the liability of the persons sought to be charged will only be established the more completely.

2. **Means of proof.** — With reference to the means of proof, it is the province of a writer on evidence to discuss the method by which facts to be established may be proved; and it is not consistent with the plan of this work to examine the principles relative to the production or admissibility of evidence. At the same time, a few observations on some points of practical importance with respect to the mode of proving the existence of a partnership are laid before the reader, in the hope that they may be found of use.

Where there is no writing. — As partnerships, even for long terms of years, very often exist in this country without any written agreement, the absence of direct documentary evidence of any agreement for a partnership is entitled to very

no partnership, if there was any real difficulty about it. See *McGregor v. Bainbrigge*, 7 Ha. 164, note, and the cases there cited, but this is no longer the practice.

(*o*) See *ante*, pp. 7 *et seq.*

(*p*) See *Peacock v. Peacock*, 2 Camp. 45.

(*q*) See as to this *ante*, p. 31.

little weight. As between the alleged partners themselves the evidence relied on, where no written agreement is forthcoming, is their conduct, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the other, dealt with other people.¹ This can be shown by books of account, by the testimony of clerks, agents, and other persons, by letters and admissions, and, in short, by any of the modes by which facts can be established (*r*).

(*r*) As to the presumption arising from the joint retainer of solicitors, see *Robinson v. Anderson*, 20 Beav. 98, and 7 De G. Me. & G. 239; *Webster v. Bray*, 7 Ha. 159; *McGregor v. Bainbridge*, ib. 164. And for cases in which a partnership has been inferred from a number of circumstances, see

Nerot v. Burnand, 4 Russ. 247, and 2 Bli. N. S. 215; *Jacobsen v. Hennekinius*, 5 Bro. P. C. 482; *Nicholls v. Dowding*, 1 Stark. 81; *Peacock v. Peacock*, 2 Camp. 45. See as to obtaining evidence from the solicitors of the alleged partners, *Williams v. Mudie*, 1 Car. & P. 158.

¹ The cases upon this subject are rather appropriate to a work on Evidence than to a work on Partnership. The authorities are numerous to the effect that a partnership may be shown to exist by parol, and that written articles are not necessary except to bind parties to enter into a future partnership.

While general reputation is held to be too vague to be considered in determining the existence of a partnership, any facts which tend to show the relation of partnership are admissible. The enumeration by the Author of the kind and variety of evidence usually available to prove the existence of an alleged partnership (*post*, pp. 89 and 90) covers the American as well as the English practice. In *Cook v. Slate Company*, 36 Ohio St. 135; s. c. 38 Am. Rep. 568, the reports of a mercantile agency were held inadmissible to show a partnership. But where general repute was admitted, in addition to other and competent evidence, a new trial was refused. *Rizer v. James*, 26 Kans. 221; and though not admissible to prove a partnership, is competent to show whether a member is a dormant partner. *Metcalf v. Officer*, 2 Fed. Rep. 640.

Of the multitude of cases bearing upon the evidence to prove a partnership a few are cited. *Grafton Bank v. Moore*, 13 N. H. 99; *Campbell v. Hastings*, 29 Ark. 512; *Teller v. Patten*, 20 How. 125; *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780; *Central R. R. Co. v. Smith*, 76 Ala. 572; *Halliday v. McDougall*, 22 Wend. 264; *Uhl v. Harvey*, 78 Ind. 26; *Bowen v. Rutherford*, 60 Ill. 41; s. c. 14 Am. Rep. 25; *Brown v. Rains*, 53 Iowa, 81; *Pollock v. Cunnard*, 2 Kerr (N. B.) 291; *Bonnell v. Chamberlain*, 26 Conn. 87; *Sager v. Tupper*, 38 Mich. 258; *Taylor v. Webster*, 39 N. J. Law, 102; *Hicks v. Cram*, 17 Vt. 449; *Towlin v. Goldsmith*, 40 Ga. 221; *Dutton v. Woodman*, 9 Cush. 255; *Ruhe v. Burnell*, 121 Mass. 450; *Robins v. Warde*, 111 Mass. 244; *Gunnison v. Langley*, 3 Allen, 337; *Moran v. Prather*, 23 Wall. 492, 23 L. ed. 121; *Porter v. Graves*, 104 U. S. 171, 26 L. ed. 691; *Clark v. Barnes*, 72 Iowa, 823; *Ripley v. Evans*, 22 Mo. 157.

Where the issues whether the alleged partnership existed in fact, and whether the alleged partners represented to a creditor that it did, are presented together, the separate admissions of the alleged partners to third persons are competent to show the partnership. *Smith v. Collins*, 115 Mass. 388. And see note 1. *ante*, p. 40, on holding out.

* **Informal documents.** — An agreement for a part- [*85] nership may be evidenced by informal documents; as, for example, an unsigned memorandum or draft agreement acted on by the partners (*s*), or a series of letters. Moreover, an agreement between A. and B. may disclose a trust for C., and be evidence for him and show him to be a partner (*t*).

A prospectus or advertisement issued by one person and assented to by another, is abundant evidence of a contract upon the terms contained in the prospectus or advertisement (*u*).

Acts of alleged co-partner. — When it is sought to make a person liable as if he were a partner, evidence must be adduced of his acts, or of what has been done by other people with his knowledge or with his consent, and the plaintiff must prove a holding out to himself (*x*). The statements and acts of the defendant's alleged co-partners are no evidence against him until he and they are shown to have been connected in some way with each other; and it is obviously reasoning in a circle to infer a partnership from acts of theirs, unless he and they can be connected by other evidence admissible against him (*y*).

Registers, &c. — Upon this principle it has been held that the registers of ships are no evidence of ownership except as against the persons upon whose affidavit the entries in the registers were made (*z*); that entries in the office in Somerset House for licencing stage-coaches, are no evidence to prove that the persons named in the licence are the owners of the coach (*a*); and that the acts, letters, and statements of one promoter of a company are no evidence against another, who cannot be shown to have authorised them (*b*).

(*s*) *Baxter v. West*, 1 Dr. & Sm. 173; *Worts v. Pern*, 3 Bro. P. C. 548 (vol. i. p. 270, in folio edit.); *Williams v. Williams*, 2 Ch. 294. See, as to mutual insurance societies, *ante*, p. 80, note (*u*).

(*t*) As in *Dale v. Hamilton*, 2 Ph. 266. See, also, *Murray v. Flavell*, 25 Ch. D. 89; *Page v. Cox*, 10 Ha. 163.

(*u*) *Fox v. Clifton*, 6 Bing. 797, 8.

(*x*) *Dickinson v. Valpy*, 10 B. & C. 140, *ante*, p. 42.

(*y*) See 1 Tay. Ev. § 753, edit. 8; *Edmundson v. Thompson*, 2 Fos. &

Fin. 564, and 8 Jur. N. S. 235; *Grant v. Jackson, Peake*, 268.

(*z*) *Tinkler v. Walpole*, 14 East, 226; *Flower v. Young*, 3 Camp. 240; and see *McIver v. Humble*, 16 East, 174.

(*a*) *Strother v. Willan*, 4 Camp. 24; *Weaver v. Prentice*, 1 Esp. 369.

(*b*) See *Drouet v. Taylor*, 16 C. B. 671; *Burnside v. Dayrell*, 3 Ex. 224; *Watson v. Charlemont*, 12 Q. B. 856. This will be again alluded to in a subsequent chapter.

[*86] * It need scarcely be observed that the principle now under discussion does not apply to exclude the testimony of a person deposing to the existence of a partnership between himself and another. Such testimony was not excluded even before the alteration of the law relating to the competency of witnesses (*e*), and there is no pretence for excluding such testimony now. If a partnership is alleged to exist between A. and B., and A. is called to prove it, and he denies it, then, although the person calling A. as a witness cannot adduce evidence to show that his testimony is generally unworthy of credit, yet such person may adduce other evidence to show that the partnership denied by the witness does in point of fact exist (*d*).

Acts of co-partners after prima facie evidence of partnership has been given. — Further it is to be observed that, notwithstanding the principle above stated, after sufficient evidence has been given to raise a presumption that several persons are partners, then the acts of each of those persons are admissible as evidence against the others for the purpose of strengthening the *prima facie* case already established. Thus, in *Norton v. Seymour* (*e*), in order to prove a partnership between the defendants Seymour and Ayres, the plaintiff called a witness who deposed that Ayres had in conversation admitted the partnership, and then the plaintiff gave in evidence a circular and invoice issued by Seymour, and headed Seymour and Ayres, and stating that the business would in future be carried on in those names. Ayres objected to the admissibility of this document, there being, as she contended, no evidence to connect her with it; but the Court held it to be admissible; for, before the document was put in, evidence of a partnership had been given, and the document tended to confirm that evidence. So in *Nicholls v. Dowding* (*f*), *prima facie* evidence of a partnership having been given, the declarations of one of the defendants were inquired into for the purpose of binding the others, and it was held that such evidence was admissible, a foundation for it having been previously laid (*g*).

(*c*) *Hall v. Curzon*, 9 B. & C. 646;

(*e*) 3 C. B. 792.

Blackett v. Weir, 5 ib. 385.

(*f*) 1 Stark. 81.

(*d*) *Ewer v. Ambrose*, 3 B. & C. 746.

(*g*) See, too, *Alderson v. Clay*, 1 Stark. 405.

* **Proof of articles, &c., not necessary.** — A person [*87] may be made liable as if he were a partner without the proof of any partnership articles or deed which he may have executed (*h*). And although in order to prove an actual partnership it may be necessary by the law of some other country to show that some formality has been observed, the non-observance of that formality will not prevent persons who in fact trade as partners, from being so treated in this country in questions arising between them and third parties (*i*).

Admissions. — An admission made by any one that he is a member of a particular partnership is evidence of that fact against him (*k*); and such an admission renders it unnecessary for the purpose of fixing him with the liabilities of a partner, to show that he executed any document whereby he became a partner (*l*).

Admissions, however, are not necessarily conclusive, and little weight ought to be attached to them if it is shown that they were made under erroneous suppositions. This seems to have been the true ground of the decision in the much debated case of *Vice v. Anson* (*m*). There the defendant supposed herself to be a shareholder in a mine; she had in private letters and in private society, written and spoken of herself as a shareholder; she had received certificates stating that her name was registered in the act-book of the mine, and that she was entitled to share the profits of it; and lastly, she had paid deposits on her shares. But Lord Tenterden held that she had not in point of fact any interest in the mine, and that as she never represented to the plaintiff that she was a shareholder therein, she could not be made liable to him simply because of her erroneous suppositions and admissions.

(*h*) *Alderson v. Clay*, 1 Stark. 405, where a person was proved to be a member of a company without the production of the company's deed.

(*i*) *Shaw v. Harvey*, Moo. & Mal. 526; *Maudslay v. Le Blanc*, 2 C. & P. 409, note.

(*k*) *Sangster v. Mazarredo*, 1 Stark. 161; *Studdy v. Saunders*, 2 D. & Ry. 347; *Clay v. Langslow*, 1 Moo. & Mal. 45.

(*l*) *Harvey v. Kay*, 9 B. & C. 356;

Ralph v. Harvey, 1 Q. B. 845; and see *Tredwen v. Bourne*, 6 M. & W. 461.

(*m*) 7 B. & C. 409, and Moo. & M. 98. See, on this case, *Owen v. Van Uster*, 10 C. B. 318, and *qu*, if it is law; for though the defendant had no legal interest in the mine, was she not entitled as a partner to share the profits obtained by working the mine? and what more was necessary to make her liable to the supplier?

[*88] * The inconclusive nature of an admission was distinctly recognised in *Ridgway v. Philip* (*n*), where Parke. B., said, "It frequently happens in cases where the liability of persons as partners comes in question, that juries are induced to give too much effect to slight evidence of admissions. An admission does not estop the party who makes it: he is still at liberty, as far as regards his own interest, to contradict it by evidence." In that case, one of the defendants was allowed to explain an admission made by him to the effect that he was in partnership with the others (*o*). So where the freighters of a ship addressed a letter to the captain instructing him on his arrival at the Cape to call upon their managing partner, Mr. W. G. Anderson, it was held competent to the freighters to show that Mr. Anderson was not a partner of theirs (*p*).

Even where a person has executed a deed describing him as a partner, the admission is not necessarily conclusive against him (*q*).

An admission by one person that he and another are partners, may be open to the explanation that they are partners to some limited extent, or with respect to some particular transaction, but not to the extent or with respect to the business necessary to sustain the case made against him (*r*).

Retrospective articles, &c.—Again, persons may agree that as between themselves, the partnership between them shall be deemed to have commenced at some time before its actual commencement. Proof of such an agreement as this would not enable a stranger to make the parties to it liable to him as partners for what took place before the partnership in point of fact began. As to third parties, such an agreement is *res inter alios acta*, which does not affect them in any way (*s*); and it is obvious that an admission of

(*n*) 1 Cr. M. & R. 415.

(*o*) See, too, *Newton v. Belcher*, 12 Q. B. 921; *Newton v. Liddiard*, ib. 925, as to the admissions made by promoters of companies as to their liabilities.

(*p*) *Brockbank v. Anderson*, 7 Man. & Gr. 295. The real question was whether Anderson was an interested witness, which he would have been had he been a partner. See *Mant v.*

Mainwaring, 8 Taunt. 139; *Brown v. Brown*, 4 ib. 752.

(*q*) See *Radcliffe v. Rushworth*, 33 Beav. 485; *Empson's case*, 9 Eq. 597.

(*r*) See *Ridgway v. Philip*, 1 Cr. M. & R. 415; and *De Berkom v. Smith*, 1 Esp. 29.

(*s*) *Wilsford v. Wood*, 1 Esp. 182; *Vere v. Ashby*, 10 B. & C. 288. This subject will be more fully examined in book ii. ch. 2, § 3.

* the existence of a partnership might be explained [*89] as true only in this limited sense; in which case the admission might be worth nothing.

Usual evidence of partnership.—The following is the kind of evidence usually had recourse to for the purpose of proving the existence of an alleged partnership or *quasi-partnership*:—

Agreements in writing and deeds, showing the right to share profits. If the signature to a deed is proved, its due execution is inferred (*t*). To prove who constituted a firm of A. and Co., the attorney of B. and Co. cannot be compelled to produce an agreement made between A. and Co. and B. and Co., if he objects on the ground of professional confidence (*u*).

Admissions (*x*), as to which see *ante*, pp. 87, 88.

Advertisements, Prospectuses, &c., containing the names of the alleged partners (*y*), and names over doors (*z*), and on carts (*a*).

Answers in Chancery containing admissions (*b*).

Bills to customers

Circulars

Invoices

} containing the names of the alleged partners (*c*).

Bills of Exchange.—The mode in which these have been drawn, accepted, or endorsed, has frequently been relied on with success (*d*).

Drafts of Agreements, which have been acted upon (*e*).

Letters and Memoranda, showing an intention to give a person a share of profits, coupled with evidence that such intention was acted on (*f*).

* *Meetings.*—Attending and taking part in them (*g*); requiring them to be called (*h*). [*90]

Payment of money into court.—When in an action against two persons as partners they pay money into court, this does not amount to an admis-

(*t*) *Grellier v. Neale*, 1 Peake, 198.

(*u*) *Harris v. Hill, Dowl. & Ry. N. P. Ca.* 17.

(*x*) *Sangster v. Mazarredo*, 1 Stark. 161; *Harvey v. Kay*, 9 B. & C. 356; *Ralph v. Harvey*, 1 Q. B. 845; *Clay v. Langslow*, 1 Moo. & M. 45.

(*y*) *Lake v. Argyll*, 6 Q. B. 477; *Bourne v. Freeth*, 9 B. & C. 632; *Maudslay v. Le Blanc*, 2 C. & P. 409, note; *Reynell v. Lewis*, 15 M. & W. 517; *Wood v. Argyll*, 6 Man. & Gr. 928. In *Ex parte Matthews*, 3 V. & B. 125, an advertisement of dissolution was relied on.

(*z*) *Williams v. Keats*, 2 Stark. 290. See, too, *Pott v. Eyton*, 3 C. B. 32, *ante*, p. 30.

(*a*) *Stables v. Eley*, 1 C. & P. 614, as to which, see *ante*, p. 47.

(*b*) *Studdy v. Saunders*, 2 D. & Ry. 347; *Grant v. Jackson*, 1 Peake, 268.

(*c*) *Young v. Axtell*, 2 H. Blacks. 242; *Norton v. Seymour*, 3 C. B. 792.

(*d*) *Spencer v. Billing*, 3 Camp. 310; *Guidon v. Robson*, 2 ib. 302; *Duncan v. Hill*, 2 Brod. & Bing. 682; *Gurney v. Evans*, 3 H. & N. 122.

(*e*) *Worts v. Pern*, 3 Bro. P. C. 558.

(*f*) *Heyhoe v. Burge*, 9 C. B. 431; *Baxter v. West*, 1 Dr. & Sm. 173, where a partnership for seven years was proved by an unsigned memorandum on which the parties had acted.

(*g*) *Lake v. Argyll*, 6 Q. B. 477, and *Wood v. Argyll*, 6 Man. & Gr. 928; noticed *ante*, p. 44. See, also, *Peel v. Thomas*, 15 C. B. 714.

(*h*) *Tredwen v. Bourne*, 6 M. & W. 461.

sion of the partnership alleged to exist between them; but only of a joint liability to the extent of the amount paid in (*i*).

Recitals in agreements (*k*).

Registers.—These do not affect a person whose name is in them unless he can be proved to have authorised the use of his name (*l*); or unless there is some statute applicable to the case. An entry in custom house books made by one of three alleged partners, to the effect that he and the other two were jointly interested in certain goods, though conclusive as between them and the Crown, is not so as between them and other persons (*m*).

Release executed by all the alleged partners (*n*).

Verdict.—A verdict of a jury finding the existence of a partnership upon the trial of an issue directed out of Chancery, was held by Lord Kenyon conclusive evidence against the partners in a subsequent action brought against them by a creditor (*o*).

Use of property by several jointly (*p*).

Witness.—A witness may be asked not only who compose such and such a firm, but also whether named individuals do so (*q*). To prove a partnership between A. in England and B. in Spain, it has been held not enough to show that A. once dwelt in a town in Spain, and that B. resides and carries on business there under the name of A., B. and Co., and that there is no one there of the name of A. (*r*).

(*i*) Charles *v.* Branker, 12 M. & W. 743.

(*k*) Leiden *v.* Lawrence, 2 N. R. 283.

(*l*) Fox *v.* Clifton, 6 Bing. 776. As to joint-stock companies, see the volume on that subject.

(*m*) Ellis *v.* Watson, 2 Stark. 453.

(*n*) Gibbons *v.* Wilcox, 2 Stark. 43.

(*o*) Whately *v.* Menheim, 2 Esp. 608. *Qu.* if this can be supported? See Coll. Part. 532, quoting Mr. Starkie's comments on the case.

(*p*) Weaver *v.* Prentice, 1 Esp. 369. See as to co-owners who are not partners, *ante*, pp. 58 *et seq.*

(*q*) Accerro *v.* Petroni, 1 Stark. 100.

(*r*) Burgue *v.* De Tastet, 3 Stark. 53.

*CHAPTER V.

[*91]

OF ILLEGAL PARTNERSHIPS.

Illegal partnerships. — In order that a partnership may result from a contract, such contract must not be illegal. This gives rise to two questions which it is proposed to discuss in this chapter, viz. 1. What partnerships are illegal; and, 2. What are the consequences of their being so.

SECTION I. — WHAT PARTNERSHIPS ARE ILLEGAL.

Illegality never presumed. — Illegality is never presumed, but must always be proved by those who assert its existence; and in order to show that a partnership is illegal it is necessary to establish either that the object of the partnership is one the attainment of which is contrary to law, or that the object being legal, its attainment is sought in a manner which the law forbids. But proof that a firm has been guilty of an illegal act is not sufficient to bring the firm within the class of illegal partnerships; for if this were enough, every partnership which does not pay its debts, or which commits any tort, or is guilty of culpable negligence, would be illegal, which is obviously absurd (*a*). Neither does it by any means follow that because one or more clauses in a contract of partnership are illegal the partnership is itself illegal (*b*).

* 1. **Grounds of illegality.** — A partnership may be [*92] illegal upon the general ground, that it is formed for a purpose forbidden by the current notions of morality, religion, or public policy. A partnership, for example, formed for the purpose of deriving profit from the sale of obscene prints, or of books reviling or ridiculing the established religion, or

(*a*) See *Armstrong v. Armstrong*, 3 M. & K. 64 and 65; *Sharp v. Taylor*, 2 Ph. 818; *Brett v. Beckwith*, 3 Jur. N. S. 31, M. R.; *Longworth's*

Ex. case, 1 De G. F. & J. 17. See the Judgment of Lord Campbell.

(*b*) See *R. v. Stainer*, L. R. 1 Cr. Ca. Res. 230; *General Co. of Land Credit*, 5 Ch. 363.

for the procurement of marriages, or of public offices of trust, would be undoubtedly illegal (*c*).

Public policy. — In the time of Charles II., it seems to have been held that a contract for sharing the profits derived from the public exhibition of a human monster was illegal (*d*); but the writer is not aware of any modern case to the same effect, and the decision alluded to would not probably now be followed upon grounds of public policy.

War. — Whilst two countries are at war it is, by the law of each country, illegal for persons resident in either to have dealings with persons resident in the other.¹ A partner-

(*c*) See the title, *Illegal Contracts*, in Chitty's and Pollock's treatises on the Law of Contracts; and as to the sale of offices, *Sterry v. Clifton*, 9 C. B. 110; and as to associations for promulgating irreligious opinions, see *Pare v. Clegg*, 29 Beav. 589; *Thornton v. Howe*, 8 Jur. N. S. 663.

(*d*) See *Herring v. Walround*, 2 Ch. Ca. 110. The thing exhibited was a pair of female children, having "two heads, four arms, four legs, and but one belly where their two bodies were conjoined."

¹ *Pfenffer v. Maltby*, 54 Tex. 454; s. c. 38 Am. Rep. 631, was an action for accounting of a partnership to carry on an illegal trade with Mexico during the American civil war. The partnership enterprise had been completed, and it was held that the defendant could not refuse to account on the ground of the illegality of the business of the partnership. And in *De Leon v. Trevino*, 49 Tex. 89; s. c. 30 Am. Rep. 100, it was held that it does not follow because a contract may be illegal that it is illegal or immoral, after its completion, to fairly settle the profits and losses which have resulted from it.

Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732, was a partnership for the purchase and sale of bounty land warrants, issued under an act of Congress, which provided that any sale or contract made prior to the issue of such warrant should be null and void. 9 U. S. Stat. 125. Martin was to furnish the money, and Brooks was to conduct the business. Martin advanced the money, and Brooks invested it in the purchase of warrants which were sold or located; and Brooks received into his hands money, notes, mortgages, and land, the fruits of the business the original capital of which had been furnished by Martin. Martin thereupon sold his interest to Brooks for a small and utterly inadequate consideration, being induced to do so by the frauds, concealment, and misrepresentation of Brooks, as to the value of the property in his hands; and the suit was to set aside the sale on the ground of fraud. It was not to enforce the original contract which was unlawful, but to set aside a subsequent agreement entered into between the parties, whereby one partner fraudulently obtained possession of the whole property; and it was decided that Brooks could not set up the original illegality, arising out of the purposes for which the partnership was first formed, as a defence; that Brooks was the special agent of Martin in the conduct of the business as well as his partner; that the law governing such fiduciary relations must apply, and the sale be set aside. In *Snell v. Dwight*, 120 Mass. 9, and *Dunham v. Presby*, id. 285, the court refused to sustain bills for an account of profits resulting from illegal trading with inhabitants of states in insurrection against the United States. In the latter case the court citing *Cardoze v. Swift*, 113 Mass. 250, say, "Nor is it material that the defendants do not set up the

ship, therefore, formed between persons resident in this country for the purpose of trading with an enemy's country is illegal; and *a fortiori* is such a partnership illegal if one of the members of it is resident in that country, and is therefore an alien enemy (*e*). But a partnership in this country for running a blockade established by one belligerent nation in the ports of another is not illegal; for subject to the risk of capture a neutral may lawfully trade with a belligerent (*f*).

Trading under an assumed name.—In this country a person may legally carry on business under a name not his own; and when a firm has an established reputation and one of its members dies, it is not deemed wrong for the survivors to continue the business under the old name, although, perhaps the reputation of the firm may have been due mainly, if not entirely, to the ability and integrity of *the [*93] deceased partner. The legal view of such conduct is in accordance with established usage, and it has been accordingly held not to be illegal for surviving partners to continue to carry on business under the old name (*g*).

Speaking generally, and excluding cases specially provided for by statute (*h*), a partnership is not illegal simply because it carries on business under a name which does not

(*e*) See *Evans v. Richardson*, 3 Mer. 469.

(*f*) *Ex parte Chavasse*, 4 De G. J. & Sm. 655; *The Helen*, L. R. 1 Ad. & Ecc. 1.

(*g*) See *Bunn v. Guy*, 4 East, 190; *Aubin v. Holt*, 2 K. & J. 66; *Lewis v. Langdon*, 7 Sim. 421; and compare *Thornbury v. Bevil*, 1 Y. & C. C. 554.

(*h*) See as to pawnbrokers, *infra*.

illegality in their answers, as no waiver by them or consent of parties can oblige a court to determine their rights under an illegal contract." And see *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468; *McKee v. United States*, 8 Wall. 163, 19 L. ed. 329; *Northwestern Ins. Co. v. Elliott*, 7 Sawy. 22; *Higgins v. McCrea*, 116 U. S. 685, 29 L. ed. 769; *Collins v. Swindle*, 6 (Ont.) Chy. 282; *Wesley v. Churchman*, 10 Vict. L. R. Eq. 214; *Cardoze v. Swift*, *supra*.

The result of the American cases may be stated to be that while illegality will not be presumed, but must be alleged and proved, and though the courts will not disturb executed contracts of partnership, or settlements between partners engaged in illegal business, executory contracts and accounting between partners engaged in illegal business will not be enforced. See *Harvey v. Varney*, 98 Mass. 118; *Pfeiffer v. Maltby*, 38 Tex. 523; *Whitcher v. Morey*, 39 Vt. 459; *Northrup v. Phillips*, 99 Ill. 449; *Hunt v. Pfeiffer*, 108 Ind. 197; *Attaway v. Third Nat. Bank*, 15 Mo. App. 577; *Hall v. Coppel*, 7 Wall. 542, 19 L. ed. 244; *Hanauer v. Doane*, 12 Wall. 342, 20 L. ed. 439; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. ed. 473; *Western Union Tel. Co. v. Union Pacific R. Co.*, 1 McCrary, 563; *Farley v. St. Paul R. R. Co.*, 4 McCrary, 141, where suit was maintained. *Gould v. Kendall*, 15 Neb. 549; *Woodworth v. Bennett*, 43 N. Y. 273; *Tucker v. Adams*, 63 N. H. 361.

disclose its members, *e.g.*, under such a name as "The City Investment and Advance Company" (*i*). It is indeed said that it is illegal at common law for persons not incorporated to assume to act as if they were, and that to trade under such a name as the above is assuming to act as a corporation: but even if assuming to act as a corporation is an offence at common law, which is very doubtful (*k*), the offence is not committed by trading under a name which is by usage as applicable to an unincorporated as to an incorporated body (*l*).

2. **Profits of crime.**—A partnership is illegal if formed for the purpose of deriving profit from a criminal offence, *e.g.*, from smuggling, robbery, theft, &c. (*m*). A curious instance of a partnership between two highwaymen is said to have come before the Courts in the last century, and to have been referred to by Lord Kenyon. As the case is not to be found in the reports, an abridged note of it is given below (*n*); but there *is some doubt whether it actually

(*i*) See *Maughan v. Sharpe*, 17 C. B. N. S. 443; *Garrard v. Hardey*, 5 Man. & Gr. 471; *Ex parte Grisewood*, 4 De G. & J. 544.

(*k*) See 6 Man. & Gr. 107, and the volume on Companies.

(*l*) See the cases in the last note but one. An unincorporated society was held to have no right to be provisionally registered under 7 & 8 Viet. c. 110, under a name which necessarily denoted a corporation, *e.g.*, the Sea, Fire, &c., Insurance Corporation, *R. v. Whitmarsh*, 14 Q. B. 803.

(*m*) See *Biggs v. Lawrence*, 3 T. R. 454; and *Stewart v. Gibson*, 7 Cl. & Fin. 707, as to smuggling. The last case is instructive on account of the care taken to conceal the true nature of the illegal transactions.

(*n*) *Everet v. Williams* (2 Pothier on Obligations, by Evans, p. 3, note citing *Europ. Mag.* 1787, vol. 2, p. 360), is said to have been a suit instituted by one highwayman against another for an account of their plunder. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, &c.; that the defendant applied to him to become a partner; that they

entered into partnership, and it was agreed that they should equally provide all sorts of necessities, such as horses, saddles, bridles, and equally bear all expenses on the roads and at inns, taverns, alehouses, markets, and fairs; that the plaintiff and the defendant proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the defendant told the plaintiff that Finchley in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the defendant informed the plaintiff that there was a gentleman at Blackheath, who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of which he believed might be had for little or no money; that they accordingly went and met with the said gentleman, and after some

occurred. Real or fictitious, it is a good illustration of an illegal partnership of the class in question (*o*).

3. **Partnerships illegal by special statutes.**—A partnership is also illegal if formed for a purpose forbidden by statute, although independently of the statute, there would be no illegality. At one time a distinction was taken between *mala prohibita* and *mala in se*; but this distinction has very properly long ceased to be recognised as of any value for legal purposes. What judicial tribunals have to regard is the law they are called on to administer; and what is forbidden by that law, is illegal, whether it is also forbidden by the laws of morality and religion or not (*p*).

Observations on such acts.—Whether a partnership is illegal by virtue of any particular statute obviously depends upon the construction of the statute in question. With reference however to those statutes which prohibit unqualified persons from carrying on certain trades *or [*95] businesses, it may be observed, that such statutes are not infringed by an unqualified person who does nothing more than share the profits arising from those trades or businesses, if they are in fact carried on by persons who are duly qualified. The unqualified person is not within the mischief of the statutes in question, and the partnership of which he is a member is not therefore illegal (*q*).

Prohibitory and penal acts.—Again, although a statute may in terms apparently prohibit an act or omission, and affix a penalty in case of disobedience, it does not necessarily follow that all transactions to which the penalty attaches are illegal. They are so if the statute is really prohibitory (*r*); but they are not so if the true construction

small discourse they dealt for the said horse, &c.; that the plaintiff and the defendant continued their joint dealings together until Michaelmas, and dealt together at several places, viz., at Bagshot, Salisbury, Hampstead, and elsewhere to the amount of 2000*l.*, and upwards. The rest of the bill was in the ordinary form for a partnership account. The bill is said to have been dismissed with costs to be paid by the counsel who signed it; and the solicitors for the plaintiff were attached and fined 50*l.*

apiece. The plaintiff and the defendant were, it is said, both hanged, and one of the solicitors for the plaintiff was afterwards transported. See 20 Eq. 230, note.

(*o*) The case was referred to by Jessel, M. R., in 11 Ch. D. 195.

(*p*) See *Aubert v. Maze*, 2 Bos. & P. 371.

(*q*) See *Raynard v. Chase*, 1 Burr. 2, and *infra*, under the heads of Medical Practitioners, Solicitors.

(*r*) *Melliss v. Shirley Local Board*, 16 Q. B. D. 446; *Cope v. Rowlands*,

of the statute is that the penalty is, as it were, the price of a licence for doing what the statute apparently forbids (*s*). Therefore, it was held in *Brown v. Duncan* (*t*), that a firm of distillers was not illegal, although one of the firm carried on business as a retail dealer in spirits within two miles of the distillery (contrary to 4 Geo. 4, c. 94, §§ 132, 133), and was not registered as one of the firm in the excise books (as required by 6 Geo. 4, c. 81, § 7). It may, however, be doubted whether the statutes in question were properly construed by the Court (*u*).

The most important instances of partnerships rendered illegal by statute are as follows (*x*):—

Attorneys and Solicitors.—See *infra*, *Solicitors*.

Bankers.—By 7 & 8 Vict. c. 32, § 21 (*y*), all bankers are required on the 1st day of January, in every year, to make a return to the stamp office of their names, residences, and occupations, or in the case of a company or partnership, of the name, residence, and occupation of every member of the *company or partnership, and in default a penalty of 50*l.* is inflicted. Upon this act a question might arise as to the legality of a banking partnership, or company, composed in part of members whose names are not returned.

By two statutes, which have since been considerably modified, it was made unlawful for banking firms of more than six members, to issue in London or within sixty-five miles thereof, notes payable on demand, or within six months after date (*z*).

2 M. & W. 149; *Bartlett v. Vinor*, Carth. 252; *Taylor v. The Crowland Gas & Coke Co.*, 10 Ex. 293.

(*s*) *Smith v. Mawhood*, 14 M. & W. 452; *Swan v. The Bank of Scotland*, 2 Mon. & Ayr. 661; *Johnson v. Hudson*, 11 East, 180.

(*t*) 10 B. & C. 93, and see *Smith v. Mawhood*, 14 M. & W. 452.

(*u*) See *Pawnbrokers*, *infra*.

(*x*) For a list of trades, &c., regulated by statute, see *Pollock on Contracts*, edit. 4, App. F., note.

(*y*) §§ 8 and 29 of this act and parts of §§ 9 and 23 are repealed by 37 & 38 Vict. c. 96.

(*z*) 39 & 40 Geo. 3, c. 28, § 15; 7

Geo. 4, c. 46. See further as to the issue of notes, 9 Geo. 4, c. 23; 3 & 4 Wm. 4, c. 83, and c. 98; 7 & 8 Vict. c. 32; *A.-G. v. Birkbeck*, 12 Q. B. D. 605; *Broughton v. Manchester & Salford Waterworks Co.*, 3 B. & A. 1; *Bank of England v. Anderson*, 3 Bing. N. C. 589; *Bank of England v. Booth*, 2 Keen, 466; and on appeal, *Booth v. Bank of England*, 6 Bing. N. C. 415; and 7 Cl. & Fin. 509. The joint effect of the above enactments seems to be that: (1.) The Bank of England can alone issue, in London, or within three miles of it, notes payable to bearer on demand. (2.) Beyond that limit such notes may be issued by

Upon these statutes, it was held, that a banking company of more than six persons associated for the purpose of issuing notes payable on demand, or within six months after date, was not illegal unless it was proved that the company issued such notes within sixty-five miles of London (*a*). Upon a similar statute relating to Ireland (*b*) it was held that in order to establish the illegality of a banking company upon the ground that its houses of business had been, from the time of the formation of the company until the commencement of the suit, and then were, at places in Ireland within fifty miles of Dublin, it was necessary to prove the existence of a place of business * within [*97] that limit for the whole time alleged (*c*). The statutes in question, moreover, have been held only to affect partnerships formed for the purpose of carrying on the business of a banker, and not to interfere with the issue of notes by firms not carrying on such business.

Brokers. — The statutes imposing penalties upon brokers who acted as such in the city of London without being duly admitted so to do by the mayor and aldermen, have been repealed by 47 Vict. c. 3. Although unqualified brokers could not recover their commission (*d*), yet they could recover from their principals money paid for them by their directions or in conformity with the usages of the share market (*e*).

Discovery by unlicensed brokers. — Liability to penalties under the repealed statutes did not protect a broker from answering interrogatories relating to his dealings and trans-

bankers who were lawfully issuing them before May, 1844, under a licence; but by no other bankers; and not, therefore, by any banking firm of more than six persons carrying on the business of bankers within sixty-five miles of London. In other words, there are three limits: (1.) London and three miles round, in which the Bank of England has an exclusive monopoly. (2.) The district more than three, but within sixty-five miles of London, in which the monopoly is divided between the Bank of England and banking firms of less than six members, lawfully issuing notes before May, 1844. (3.) The

district more than sixty-five miles from London, in which the monopoly is divided between the Bank of England and banking firms of six or more or less members, lawfully issuing notes before May, 1844.

(*a*) *Ransford v. Copeland*, 6 A. & E. 482.

(*b*) 6 Geo. 4, c. 42, § 10.

(*c*) *Hughes v. Thorpe*, 5 M. & W. 656.

(*d*) *Cope v. Rowlands*, 2 M. & W. 149.

(*e*) *Smith v. Lindo*, 4 C. B. N. S. 395, and 5 ib. 587; *Pidgeon v. Burslem*, 3 Ex. 465; *Jessopp v. Lutwyche*, 10 Ex. 614.

actions if he was sued in respect of them by his principal (*f*).

Marine insurers. — By a statute now repealed, it was made unlawful for any society or partnership (except the two corporations mentioned in the act) to carry on the business of maritime insurance or to lend money on bottomry (*g*). This enactment gave rise to numerous decisions which are frequently referred to as illustrating the consequences resulting from an illegal contract of partnership; and they will be noticed hereafter when those consequences are examined. In the present place, however, it is not necessary to do more than collect them in a note for facility of reference (*h*).

The Marine policy stamp act, 30 Vict. c. 23, prevents marine insurances being effected otherwise than by [*98] written policies *duly stamped (*i*). Consequently, if the members of a mutual insurance company insure each other's ships without any policies, the insured has no remedy against the insurers in case of a loss (*k*).

Medical practitioners. — By 55 Geo. 3, c. 194, § 14, unqualified medical men are prohibited from practising; and by the Medical act, 1858 (*l*), it is enacted (§ 32) that no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under the act. By the same act (§ 40), penalties are inflicted on all persons who wilfully and falsely pretend to be, or take, or use the

(*f*) *Green v. Weaver*, 1 Sm. 404; *Robinson v. Kitchin*, 8 De G. Mc. & G. 88, and 21 Beav. 365.

(*g*) 6 Geo. 1, c. 18, repealed by 5 Geo. 4, c. 114, § 1, as to insurances.

(*h*) The following are the decisions on the above enactment: *Mitchell v. Cockburn*, 2 H. Blacks. 379; *Booth v. Hodgson*, 6 T. R. 405; *Lees v. Smith*, 7 ib. 338; *Harrison v. Millar*, ib. 340, note; *Everth v. Blackburne*, 2 Stark. 66; *Ex parte Bell*, 1 M. & S. 751; *Aubert v. Maze*, 2 Bos. & P. 371; *Watts v. Brooks*, 3 Ves. 612; *Knowles v. Haughton*, 11 ib. 168.

(*i*) They can now be stamped after their execution on payment of

a penalty, 39 Vict. c. 6, § 2; but a written policy is still necessary.

(*k*) See *Edwards v. Aberayron Mutual Soc.*, 1 Q. B. D. 563; *Ex parte Hargrove*, 10 Ch. 542; *Fisher v. Liverpool Marine Insur. Co.*, L. R. 9 Q. B. 418; *Smith's case*, 4 Ch. 611; *Brett v. Beckwith*, 3 Jur. N. S. 31; *Bromley v. Williams*, 32 Beav. 177. With these cases compare *Martin's case*, 14 Eq. 148.

(*l*) 21 & 22 Vict. c. 90. As to chemists and druggists, see 31 & 32 Vict. c. 121, and *Pharmaceutical Soc. v. Lond. Supply Assoc.*, 5 App. Ca. 557.

name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addition, or description implying that he is registered under the act, or is recognised by law as a physician, &c.

Upon the above acts it has been decided that agreements contrary to 55 Geo. 3, are illegal and cannot be enforced (*m*); but that a medical practitioner may maintain an action for attendances, &c., although not registered when they took place, it being sufficient that he should be registered at the time of trial (*n*); and there is nothing illegal in one member of a firm being registered in one character and another in another; nor in their respectively attending to their appropriate branches of the profession; nor in their jointly suing in respect of the services rendered by each in his own branch (*o*). It has also *been intimated [*99] by high authority, that if only one member of a firm is duly registered, the requisitions of the statute are complied with (*p*); but the unregistered partner cannot lawfully act as a physician, surgeon, or apothecary (*q*).

Newspaper proprietors. — By 44 & 45 Vict. c. 60, § 8, the titles of newspapers, and the names, occupations and residences of their proprietors, are required to be registered with the Registrar of Joint Stock Companies, and penalties are payable on default.

Patentees. — Prior to 1852 a patent for an invention contained a proviso to the effect that the patent should be void if more than twelve persons became interested in it as partners (*r*). But now there is no limit placed upon the number of persons who may be interested in a patented invention.

Pawnbrokers. — By 35 & 36 Vict. c. 93, § 13, every pawnbroker is required to have his name legibly printed over the

(*m*) *Davies v. Makuna*, 29 Ch. D. 596.

(*n*) *Turner v. Reynall*, 14 C. B. N. S. 328.

(*o*) *Ibid*.

(*p*) *Per Erle, C. J.*, *ib.* Compare the cases in the next note. See, further, *De la Rosa v. Prieto*, 16 C. B. N. S. 578; and as to pretending to be a legally qualified practitioner, see *Pedgrift v. Chevallier*, 8 C. B. N. S. 240 and 246; *Ellis v. Kelly*, 6 H. & N.

222. The cases decided upon the Apothecaries acts, 55 Geo. 3, c. 194, and 6 Geo. 4, c. 133, will be found in 1 Chitty's Statutes.

(*q*) *Howarth v. Brearley*, 19 Q. B. D. 303; *Davies v. Makuna*, 29 Ch. D. 596; *Pharmaceutical Soc. v. Lon. Supply Assoc.*, 5 App. Ca. 857.

(*r*) *Hindmarch on Patents*, 66. See *Duvergier v. Fellowes*, 5 Bing. 248, and on appeal, 10 B. & C. 826, and 1 Cl. & Fin. 39.

door of every shop or place where he carries on his business. Under the previous act, 39 & 40 Geo. 3, c. 98, an agreement to carry on a pawnbroking business in partnership was illegal if it was part of the agreement that the names of some of the partners should be concealed, or, in other words, if it was part of the agreement that some of the partners should be dormant (*s*). Whether these decisions apply to the present act is open to some doubt (see § 51), but they probably do. It is conceived, however, that pawnbroking may be legally carried on by a registered company, if the name of the company is properly painted up.

[*100] * **Solicitors.**—By several statutes it has long been unlawful for any person, not duly qualified, to act by himself or another as a solicitor, or to suffer his name to be made use of upon the account, or for the profit of an unqualified person (*t*). Upon these statutes questions have arisen as to how far it is lawful for a qualified solicitor to share the profits of his business with a person who is not qualified; and it has been held that there is no illegality in this where the non-qualified person does not share the profits in consideration of his acting in any manner as a solicitor (*u*). For example, there is nothing illegal in an agreement that a surviving partner of a firm of solicitor shall share his profits with the widow of a late partner (*x*).

But an agreement for a partnership in the ordinary sense of the word between a person duly qualified and one who is not, is clearly illegal (*y*); and if the agreement is in writing, and is for a present partnership, parol evidence cannot be admitted to show that it was not to take effect until both parties were qualified (*z*). But an agreement between a solicitor and his articled clerk that the latter, when a solici-

(*s*) See *Lewis v. Armstrong*, 3 M. & K. 53; *Armstrong v. Lewis*, 2 Cr. & M. 274; *Gordon v. Howden*, 12 Cl. & Fin. 237; *Fraser v. Hill*, 1 M'Queen, 392. Compare *Brown v. Duncan*, 10 B. & C. 93, where one of a firm of distillers was not licenced as required by the excise law.

(*t*) See 6 & 7 Vict. c. 73, §§ 2, 26, 32; 23 & 24 Vict. c. 127, § 26; and 37 & 38 Vict. c. 68, § 12. See as to partnerships between town clerks and other solicitors, *Hughes v. Statham*, 4 B. & C. 187; and as to prosecutions

by partners of clerks of the peace, see 5 & 6 Will. 4, c. 76, § 102, and *R. v. Fox*, 1 E. & E. 729.

(*u*) *Scott v. Miller, Johns*. 220, is a strong case on this head.

(*x*) *Candler v. Candler*, Jac. 225, and 6 Madd. 141; *Sterry v. Clifton*, 9 C. B. 110; and see *Aubin v. Holt*, 2 K. & J. 66. See also *ante*, Medical Practitioners.

(*y*) *Williams v. Jones*, 5 B. & C. 108. See *Scott v. Miller, Johns*. 220.

(*z*) *Williams v. Jones*, 5 B. & C. 108.

tor, shall become a partner with the former and share his profits retrospectively, is not illegal (*a*). However, the statutes cannot be evaded by an agreement to the effect that the unqualified person shall receive a share of the profits as a salary, and that he shall not be a partner with the other (*b*). Nor can a solicitor's clerk (unless himself qualified) act as a solicitor under cover of his *prin- [*101] cipal's name (*c*). It was, however, held that a person who had been duly examined, sworn, and admitted, but who had not taken out his annual certificate, was not unqualified within the meaning of the act of Geo. 2 (*d*); and since the act 6 & 7 Vict. c. 46, it has been held not unlawful for a qualified solicitor to act upon the usual agency terms as the solicitor of another solicitor who has not taken out his certificate (*e*).

It is illegal for two persons, one qualified and the other unqualified, to hold themselves out as partners, and to put both their names to bills of costs and other documents in which their names ought not to appear, unless they are qualified solicitors (*f*).

Theatrical representations.—By several statutes now repealed (*g*) it was unlawful to act any play for gain except under certain restrictions. Partnerships therefore for sharing profits to be derived from acting plays otherwise than in accordance with these acts were illegal (*h*).

Unincorporated joint-stock companies with transferable shares.—The question whether unincorporated companies with transferable shares were illegal at common law or under the Bubble Act of 1719 (6 Geo. 1, c. 18), will be found discussed in the volume on Companies. The question has now only a historical interest.

Unregistered Partnerships, &c.—By the Companies Act,

(*a*) *Ex parte* Joyce, 4 Ch. D. 596.

(*b*) *Tench v. Roberts*, 6 Madd. 145; *Re Jackson*, 1 B. & C. 270; see, too, *Re Clark*, 3 D. & R. 260; *Hopkinson v. Smith*, 1 Bing. 13. Quære the effect on these cases of the act 28 & 29 Vict. c. 86, *ante*, pp. 35 *et seq.*

(*c*) *Hopkinson v. Smith*, 1 Bing. 13; *Re Palmer*, 2 A. & E. 686.

(*d*) *Re Hodgson*, 3 A. & E. 224; and see *Hodgkinson v. Mayer*, 5 A. & E. 194.

(*e*) *Ex parte* Foley, 11 Beav. 456.

(*f*) *Edmonson v. Davis*, 4 Esp. 14.

(*g*) 10 Geo. 2, c. 28; 25 ib. c. 36 (made perpetual by 28 ib. c. 19); and 28 Geo. 3, c. 30; repealed by 6 & 7 Vict. c. 68. As to what is a theatre within this act, see *Davys v. Douglas*, 4 H. & N. 180.

(*h*) *Ewing v. Osbaldiston*, 2 M. & Cr. 53; *De Bagnis v. Armistead*, 10 Bing. 107.

1862, § 4, all banking partnerships of more than ten members, and all other partnerships of more than twenty members, formed after the 2d of November, 1862 (*i*), must be registered under that act unless formed in pursuance of some special act, charter, or letters patent, or for working mines in the Stannaries: and any partnership re-
 [*102] quired to be registered and *not registered is illegal (*k*). This subject will be found more fully examined in the volume on Companies.

SECTION II.—CONSEQUENCES OF ILLEGALITY.

Consequences of illegality.—If a partnership, when it is formed, will be illegal, any contract to form it must be illegal also. Upon this ground it was held in *Duvergier v. Fellowes* (*l*), that a bond for the payment of money upon the formation by the obligee of an illegal company was invalid; and in *Williams v. Jones* (*m*), that no action lay for the recovery of a premium agreed to be paid by the defendant, on being taken into partnership with the plaintiff, and which partnership was illegal.

Enforcing agreement.—An agreement for an illegal partnership will not be enforced even if it has been partly performed. *Ewing v. Osbaldiston* (*n*) is a good instance of this. There the plaintiff and the defendant agreed to become partners in a theatre. The plaintiff advanced part of the money, and the defendant applied it in part payment for a lease of the theatre. The lease was afterwards assigned to him alone. The defendant did not perform his part of the agreement, and the plaintiff accordingly filed a bill against him. The bill prayed that it might be declared that the plaintiff and the defendant were partners in the theatre, and in the lease

(*i*) See as to this *Shaw v. Simons*, 12 Q. B. D. 117, and as to what associations need not be registered, *Smith v. Anderson*, 15 Ch. D. 247.

(*k*) *Jennings v. Hammond*, 9 Q. B. D. 225; *Shaw v. Benson*, 11 ib. 563; *Ex parte Poppleton*, 14 Q. B. D. 379; *Padstow Total Loss Assoc.*, 20 Ch. D. 137; *Sykes v. Beadon*, 11 Ch. D. 170,

although overruled by *Smith v. Anderson*, 15 Ch. D. 247, on the necessity of registration, would have been rightly decided if the association had required registration.

(*l*) 5 Bing. 248; 10 B. & C. 826; and 1 Cl. & Fin. 39.

(*m*) 5 B. & C. 108.

(*n*) 2 M. & Cr. 53.

thereof, and that the agreement made between the plaintiff and the defendant might be performed, and, if necessary, that the partnership might be dissolved, and the usual accounts taken. The agreement, however, was illegal, by 10 Geo. 2, c. 28, and the bill was dismissed. It was decided, on appeal, that the agreement being illegal, it was impossible for the Court to decree its specific performance; and that if the plaintiff sought to recover back *the [*103] money he had paid, he could not do so in that suit, as (even if he had a lien on the property for the money, which the Court denied), the bill did not seek to enforce such lien.

Actions by an illegal partnership.—If a partnership is illegal, its members cannot maintain any action in respect of any transaction tainted with the illegality. For example, if a partnership is formed for selling smuggled goods, it cannot recover the price of any smuggled goods which it may have sold (*o*). So an illegal loan society cannot recover money it has lent (*p*). But an illegal partnership can prosecute a person stealing its property (*q*).

Actions against an illegal partnership.—The illegality of a partnership affords no reason why it should not be sued. It cannot indeed be effectually sued by any person who, being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm (*r*); but the illegality of the firm does not *per se* afford any answer to a demand against it, arising out of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the firm is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpi causâ non oritur actio*; and he, not being implicated in any illegal act himself, cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership (*s*).

So, if a partnership or company has been established by fraud, and persons have been induced to join it by false and

(*o*) See *Biggs v. Lawrence*, 3 T. R. 454.

(*p*) *Shaw v. Benson*, 11 Q. B. D. 563; *Jennings v. Hammond*. 9 ib. 225.

(*q*) See *R. v. Frankland, L. & C.*

276; 9 Jur. N. S. 388; 32 L. J. M. C. 69.

(*r*) *Re South Wales Atlantic Steamship Co.*, 2 Ch. D. 763.

(*s*) See the judgment of Mellish, L. J., in the last case, and *Brett v. Beckwith*, 3 Jur. N. S. 31, M. R.

fraudulent representations, still the fraud so perpetrated, affords no answer to a creditor of the firm (*t*), unless that creditor has himself been party to the fraud (*u*). Moreover, where a company has been established by fraud, and where it has been engaged in illegal transactions, the innocent shareholders *are nevertheless liable amongst themselves to contribute if necessary to the payment of the debts of the company; for such shareholders are not so *in delicto* as to preclude any one of them from calling on the others to share the losses to which he and they are liable (*x*).

Actions for contribution, &c.—The most important consequence, however, of illegality in a contract of partnership is, that the members of the partnership have no remedy against each other for contribution or apportionment in respect of the partnership dealings and transactions. However ungracious and morally reprehensible it may be for a person who has been engaged with another in various dealings and transactions to set up their illegality as a defence to a claim by that other, for an account and payment of his share of the profits made thereby, such a defence must be allowed to prevail in a court of justice. Were it not so, those who—*ex hypothesi*—have been guilty of a breach of the law, would obtain the aid of the law in enforcing demands arising out of that very breach; and not only would all laws be infringed with impunity, but, what is worse, their very infringement would become a ground for obtaining relief from those whose business it is to enforce them. For these reasons, therefore, and not from any greater favour to one party to an illegal transaction than to his companions, if proceedings are instituted by one member of an illegal partnership against another in respect of the partnership transactions, it is competent to the defendant to resist the proceedings on the ground of illegality (*y*). There are indeed some old cases in which this defence was not allowed to prevail (*z*); but they have been long overruled (*a*).

(*t*) *Henderson v. The Royal Brit. Bank*, 7 E. & B. 356.

(*u*) See *Batty v. McCundie*, 3 C. & P. 203.

(*x*) See *Longworth's Ex. case*, Johns. 465, affirmed 1 De G. F. & J. 17.

(*y*) See *Sykes v. Beadon*, 11 Ch. D. 170; *Holman v. Johnson*, 1 Cowp. 341; *Thomson v. Thomson*, 7 Ves. 470; *Cousins v. Smith*, 12 Ves. 544.

(*z*) *Dover v. Opey*, 2 Eq. Ca. Ab. 7; *Watts v. Brooks*, 3 Ves. 611.

(*a*) See the cases cited *infra*.

Waiver of illegality.—Moreover, if the illegality is brought to the notice of the Court, it will of its own accord decline to interfere between the parties, although there may be no desire on their part to urge such an objection (*b*).

Illegality a defence at law.—When partnerships of marine insurers were illegal, it was * held that if one [*105] member of a firm of such insurers paid all the losses sustained by the firm, he could not recover any part of the money paid from his co-partners (*c*); and that if the premiums were received by one only, the others could not obtain their shares from him (*d*). So, where there was an express covenant to pay such shares, the covenant was held to be invalid by reason of the illegality which tainted it (*e*); and even where an arbitrator had awarded what was to be paid by one partner to the other, it was held that the award could not be enforced (*f*). These cases are of undoubted authority, and are always referred to as such, although the particular ground of illegality on which they rested no longer exists. It has indeed been held, in one or two cases of illegal partnership, that if one partner has paid losses at the special request of the other, who promised to pay his share afterwards, an action for such share may be sustained (*g*); but these cases cannot be reconciled with others, and must be taken to be overruled. In *De Begnis v. Armisted* (*h*), the plaintiff and the defendant entered into an illegal agreement for bringing out an opera and dividing the profits arising from it. By the agreement the plaintiff was to pay the singers, and the defendant was to provide a theatre and pay the dancers. This was done; but instead of profits, there were losses, and on the whole account a balance was found due to the plaintiff. A bill for the balance was given by the defendant, and it was proved that the balance was made up of different sums paid by the plaintiff at the defendant's request. It was nevertheless held that the original agreement being illegal, the plaintiff could not recover the balance in question, either on the bill or the common money counts.

(*b*) *Evans v. Richardson*, 3 Mer. 469.

(*c*) *Mitchell v. Cockburn*, 2 H. Blacks. 380.

(*d*) *Booth v. Hodgson*, 5 T. R. 405.

(*e*) *Lees v. Smith*, 7 T. R. 338.

(*f*) *Aubert v. Maze*, 2 Bos. & P. 371.

(*g*) See *Petrie v. Hannay*, 3 T. R.

418; *Faikney v. Reynous*, 4 Burr. 2070.

(*h*) *De Begnis v. Armistead*, 10 Bing. 107. See *Fisher v. Bridges*,

3 E. & B. 642, reversing s. c. 2 ib. 118.

Illegality a defence to an account.—Nor can an action for an account be sustained by one member of an illegal partnership against another, in respect of its dealings and [*106] transactions (*i*). Thus if an association is *illegal by reason of non-registration under the Companies Act, 1862, an action cannot be sustained by its members against its trustees for the execution of their trust, nor to make them responsible for losses arising from breaches of trust (*k*).

Concealed illegality.—Moreover, if it can be shown that the purpose with which a partnership was formed was illegal, the consequences of illegality will follow, however skilfully the true purpose may have been concealed (*l*); and parol evidence may be given to show the existence of the illegality, however formally the partnership agreement may have been drawn up, and however successful the parties may have been in making that agreement legal on the face of it (*m*).

Illegality, when not a defence.—In order, however, that illegality may be a defence, it must affect the contract on which the plaintiff is compelled to rely, in order to make out his right to what he asks. It by no means follows, from the circumstance that money has been obtained in breach of some law, that therefore whoever is in possession of such money is entitled to keep it in his own pocket.

Effect of illegality on the right to recover back subscriptions.—If money is paid by A. to B. to be applied by him for some illegal purpose, it is competent for A. to require B. to hand back the money if he B. has not already parted with it (*n*), and the illegal purpose has not been carried out (*o*). Although, therefore, the subscribers to an illegal company have not a right to an account of the dealings and transactions of that company and of the profits made thereby, they have a right to have their subscriptions re-

(*i*) *Knowles v. Haughton*, 11 Ves. 168; *Armstrong v. Armstrong*, 3 M. & K. 45; *Harvey v. Collett*, 15 Sim. 332.

(*k*) *Sykes v. Beadon*, 11 Ch. D. 170, is an authority for this proposition, although overruled on another ground, *ante*, p. 101.

(*l*) *Stewart v. Gibeon*, 7 Cl. & Fin. 707; *Armstrong v. Armstrong*, 3 M. & K. 53.

(*m*) See *Collins v. Blantern*, 2 Wils. 341, and 1 Sm. L. Ca., and the notes there.

(*n*) See *Taylor v. Lendy*, 9 East, 49; *Varney v. Hickman*, 5 C. B. 271; *Diggle v. Higgs*, L. R. 2 Ex. D. 422; *Hampden v. Walsh*, 1 Q. B. D. 189; *Taylor v. Bowers*, *ib.* 291.

(*o*) See *Herman v. Jeuchner*, 15 Q. B. D. 561.

turned (*p*); and even though the moneys subscribed have been laid out in the purchase of land *and [*107] other things for the purpose of the company, the subscribers are entitled to have that land and those things reconverted into money, and to have it applied as far as it will go in payment of the debts and liabilities of the concern, and then in repayment of the subscriptions. In such cases, no illegal contract is sought to be enforced; on the contrary, the continuance of what is illegal is sought to be prevented (*q*).

Again, *Tenant v. Elliott* (*r*), and other cases, decided that if A. and B. are parties to an illegal contract, and B. in pursuance thereof pays money to C. for A.'s use, A. can recover this money from C. It follows from this that if two partners, A. and B., enter into an illegal agreement with C., and in pursuance of this agreement C. pays money to D. for the use of A. and B., not only can A. and B. recover this money from D., but if he pays it over to either one of the two partners, that one must account to the other for his share of it. This must also be the case if C., instead of paying the money to D., pays it over at once to A. or B. In other words, it follows from *Tenant v. Elliott* and that class of cases, that if an illegal act has been performed in carrying on the business of a legal partnership, and gain has accrued to the partnership from such act, and the money representing that gain has been actually paid to one of the partners for the use of himself and co-partners, he cannot set up the illegality of the act from which the gain accrued as an answer to a demand by them for their share of what he has received. Upon this principle it was held in *Sharp v. Taylor* (*s*), that a partner was entitled to an account against his co-partner of monies actually come to the hands of the latter, from the employment of a ship in a manner not permitted by the navigation laws; and in *Sheppard v. Oxenford* (*t*) that the

(*p*) See *Harvey v. Collett*, 15 Sim. 332. Compare the cases in the next note.

(*q*) *Sheppard v. Oxenford*, 1 K. & J. 491; *Butt v. Monteaux*, ib. 98. See also *Symes v. Hughes*, 9 Eq. 475; *Taylor v. Bowers*, 1 Q. B. D. 291.

(*r*) *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russell*, ib. 296; *Bous-*

field v. Wilson, 16 M. & W. 185; *Nicholson v. Gooch*, 5 E. & B. 999.

(*s*) 2 Ph. 801, recognised in *Sheppard v. Oxenford*, 1 K. & J. 491. Compare *Sykes v. Beadon*, 11 Ch. D. 170.

(*t*) 1 K. & J. 491. See, too, *Butt v. Monteaux*, ib. 98.

directors of an illegal company were liable to account *for the money received by them on behalf of the company and for the use of its members.

Illegality set up by executors.—An executor or administrator of a deceased partner cannot protect himself from accounting for the estate of the deceased by setting up against his creditors, legatees, or next of kin, the illegality of the transactions in which the deceased may have been concerned (*u*). That has nothing to do with their claims; and the reasons upon which the maxim *ex turpi causâ non oritur actio* is founded, evidently have no application to such a case. Even if the executor was one of the deceased's co-partners, and was thus mixed up with him in the illegal transactions, still if the share of the deceased in the gains arising from them has actually been placed to his credit in the partnership books and has come or might have come to the hands of the executor as such, he must account for that share (*x*). But if there has been no account settled, it would seem that the executor may in his character of partner rely on illegality, and decline to come to any account in respect of the gains in question (*y*).

Illegal trusts.—But notwithstanding *Tenant v. Elliott*, *Sharp v. Taylor*, and other cases of that class, illegal trusts will not be enforced. *Sykes v. Beadon* (*z*), already referred to, is a clear authority for this proposition. Another authority is *Ottley v. Browne* (*a*). There A., who was a shareholder with B. and others in two companies, wished to become a banker; and in order to evade a statute which rendered it illegal for a banker to be a partner in commercial undertakings (*b*), A. assigned his shares to B. in trust for himself. B., who carried on a separate trade, was made bankrupt, and his assignees sold all his shares in the above companies, and also the shares held by him in trust for A. A. then filed a bill against B.'s assignees, praying that they might be declared trustees of these last shares for him, A., and that they might be ordered to pay the value [*109] *thereof to him, or that he might be at liberty to

(*u*) See *Joy v. Campbell*, 1 Sch. & Lef. 339; *Hale v. Hale*, 4 Beav. 369. & Bea. 360; and compare *Sharp v. Taylor*, 2 Ph. 801.

(*x*) See *Joy v. Campbell*, 1 Sch. & Lef. 328.

(*y*) See *Ottley v. Browne*, 1 Ball.

(*z*) 11 Ch. D. 170, *ante*, p. 105.

(*a*) 1 Ball. & Bea. 360, and see *Ex parte Mather*, 3 Ves. 373.

(*b*) 29 Geo. 2, c. 16 (Irish).

prove for such value against B.'s estate; but the bill was dismissed with costs, on the ground that it sought to enforce a secret trust, which was directly against a positive law (*c*).

Indictment. — Before quitting the subject of the consequences of the illegality of a partnership, the risk of criminal prosecution ought to be mentioned. Persons engaged in an illegal business, whether partners or not, and whether incorporated or not, are liable to be punished criminally (*d*); and even where the object of a society is not illegal, its directors and managers will do well to bear in mind, that if they wilfully violate the provisions of an act of Parliament they are guilty of a misdemeanour, and are liable to be indicted accordingly (*e*).

(*c*) The same principle is illustrated by *Thomson v. Thomson*, 7 Ves. 470, which, however, was not a partnership case.

(*d*) See the title Conspiracy in

Russell on Crimes, and Archbold's Criminal Law.

(*e*) See Lord Campbell's observations in *Longworth's Ex. case*, 1 De G. F. & J. 31.

[*110]

* CHAPTER VI.

OF THE GENERAL NATURE OF A PARTNERSHIP.

SECTION I.—OF THE MERCANTILE AND THE LEGAL NOTION OF A FIRM.

Mercantile view of a firm.—Partners are called collectively a firm. Merchants and lawyers have different notions respecting the nature of a firm (*a*). Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, *i.e.*, as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts, the *firm* is made debtor to each partner for what he brings into the common stock, and each partner is made debtor to the *firm* for all that he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions; but are always either debtors to or creditors of the firm.

Owing to this impersonification of the firm, there is a tendency to regard its rights and obligations as unaffected by the introduction of a new partner, or by the death or retirement of an old one. Notwithstanding such changes among its members, the *firm* is considered as continuing the same; and the rights and obligations of the old firm are regarded as continuing in favor of or against the [*111] new firm as if no changes had *occurred. The partners are the agents and sureties of the firm: its agents for the transaction of its business; its sureties for the liquidation of its liabilities so far as the assets of the

(*a*) See on this subject Cory's Treatise on Accounts (2d ed. 1839, Pickering), a valuable work, but, it is believed, not so widely known as it should be. See, too, a paper by J. M. Ludlow, Esq., "On the mer-

cantile notion of the firm, and the need of its legal recognition," in the 2d Vol. of the Papers read before the Juridical Society, p. 40. To both of these the writer desires to acknowledge his obligations.

firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets.

Legal view of a firm.— But this is not the legal notion of a firm. The firm is not recognised by lawyers as distinct from the members composing it (*b*). In taking partnership accounts and in administering partnership assets, Courts have to some extent adopted the mercantile view, and actions may now be brought by or against partners in the name of their firms (*c*); but speaking generally, the firm as such has no legal recognition. The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. In point of law, a partner may be the debtor or the creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member (*d*).

A member of an ordinary partnership fills a double character; he is both a principal and an agent. As a principal he is bound by what he does himself and by what his co-partners do on behalf of the firm, provided they keep within the limits of their authority; as an agent he binds them by what he does for the firm, provided he keeps within the limits of his authority. But a partner is not the surety of the firm. Every member of an ordinary partnership, however numerous the partners may be, is liable as a principal to have his private property seized for a partnership debt, whether the firm has assets to pay it or not; and not only so, but the property of the firm is liable to be seized for the private debts of any of *the partners com- [*112] posing it (*e*). This non-recognition of the firm, in the mercantile sense of the word, is one of the most marked differences between partnerships and incorporated companies.

(*b*) *Ex parte* Gliddon, 13 Q. B. D. 43; *Hoar v. Oriental Bank Corporation*, 2 App. Ca. 589, illustrate this; and see *per James, L.J.*, in *Ex parte Corbett*, 14 Ch. D. 126.

(*c*) Rules of Sup. Ct., Ord. xvi. rule 14; Bank. Act, 1883, § 115, and Bank. Rules, 1886, r. 259.

(*d*) See Lord Cottenham's judgment in *Richardson v. The Bank of England*, 4 M. & Cr. 171, 172; and *De Tastet v. Shaw*, 1 B. & A. 664.

(*e*) See Execution, in book ii. ch. 3, § 4.

SECTION II.—CONSEQUENCES OF THE NON-RECOGNITION OF THE FIRM IN THE MERCANTILE SENSE.

1. *Generally as regards its name.*

Name of a firm.—It follows from the foregoing remarks, that the name under which a firm carries on business is in point of law a conventional name applicable only to the persons who, on each particular occasion when the name is used, are members of the firm (*f'*). When a firm is spoken of by its name or style, evidence is admissible to show who in fact constituted the firm at the time in question (*g*): and if persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name, is as valid as if real names had been used.¹ This is seen every day in the case of bills of exchange and promissory notes; and even in the case of more formal instruments, there is

(*f'*) A firm is usually described in legal proceedings as certain persons trading or carrying on business under, and using the name, style, and firm of, &c. As to the sufficiency of this description, see *Smith v. Ball*, 9 Q. B. 361.

(*g*) *Carruthers v. Sheddon*, 6 Taunt. 15; *Bass v. Clive*, 4 M. & S. 13; *Stubbs v. Sargon*, 2 Keen, 255, and 3 M. & Cr. 507; *Latouche v. Waley*, *Hayes and Jones (Ir. Ex.)*, 43.

¹ A partnership can exist without a firm name, even when there are articles; but the great convenience makes a name almost a necessity, and in the absence of statute provisions, there seems to be absolutely no restriction in the choice or change of a name, which may be the individual name of one or more members, or of all, or a mere creation of the fancy; and there may be several names, or two firms may constitute a new firm without adopting a new name; or again, two firms composed in part of the same persons, may adopt the same name. *Pursley v. Ramsay*, 31 Ga. 403; *Wright v. Hooker*, 10 N. Y. 51; *Kitner v. Whitlock*, 88 Ill. 514; *Bank of Rochester v. Monteith*, 1 Den. 402; *Ontario Bank v. Hennessey*, 48 N. Y. 545; *Crawford v. Collins*, 45 Barb. 269; s. c. 30 How. Pr. 398; *Ottoman Calvey Co. v. Dane*, 95 Ill. 204; *Palmer v. Stevens*, 1 Den. 471; *Getchell v. Foster*, 106 Mass. 42; *Lill v. Eagan*, 89 Ill. 609; *Haskins v. D'Este*, 133 Mass. 356; *Markham v. Hazen*, 48 Ga. 570; *Le Roy v. Johnson*, 2 Pet. 186, 198, 7th L. edit. 391; *Mifflin v. Smith*, 17 S. & R. 165; *U. S. Bank v. Binney*, 5 Mason, 176; s. c. 5 Pet. 529; *Manuf. & Mech. Bank v. Winship*, 5 Pick. 11; *Etheridge v. Binney*, 9 Pick. 272; *Michael v. Workman*, 5 W. Va. 391; *Crocker v. Colwell*, 46 N. Y. 212; *Moffat v. McKissick*, 8 Baxter, 517; *Tilford v. Ramsay*, 37 Mo. 563; *Miner v. Donner*, 20 Vt. 461; *Mershon v. Hobensach*, 22 N. J. L. 372; *West v. Valley Bank*, 6 Ohio St. 168; *Elkin v. Green*, 13 Bush. 662; *Fosdick v. Van Horn*, 40 Ohio St. 459.

Notes payable to Chas. & Wm. F., sold by Charles F. to plaintiff and purporting to be assigned to plaintiff by Chas. & Wm. F., represented by Chas. F. to be partners, are not *prima facie* payable to a firm. There is no conclusion in law that Chas. & Wm. F. are a firm. *Ryhener v. Feickert*, 92 Ill. 305; s. c. 34 Am. Rep. 130.

no doubt of their validity, although some of the executing parties may be described as A. & Co. (*h*). So partners

(*h*) See *Maughan v. Sharpe*, 17 C. B. N. S. 443, a mortgage; *Brutton v. Burton*, 9 Charity, 707, a warrant of attorney; *Evans v. Curtis*, 2 C. & P. 296, an agreement for a lease; *Moller v. Lambert*, 2 Camp. 548, a bond; *Gorrie v. Woodley*, 17 Ir. Com. L. Rep. 221, a guarantee; *Latouche v. Waley, Hayes & Jones* (Ir. Ex.) 43. How far the firm is bound by instruments on which its true name does not appear, will be seen hereafter; and see as to the parties to sue on a covenant with a firm, *Metcalf v. Rycroft*, 6 M. & S. 75, noticed *infra*, book ii. ch. 3.

"The whole significance of the firm name" is "it is a name which the partners adopted by which each could, in certain matters, bind the other with himself, or another agent might bind both." *Haskins v. D'Este*, 133 Mass. 356. And see *Bolckow v. Foster*, 25 Ont. Ch. 476, defining "firm" to mean partnership, so that a mortgage to secure the firm can be foreclosed by the surviving member.

There is no presumption that the firm name includes more than one. *Robinson v. Magarity*, 28 Ill. 423; *Chinic v. Gervais*, 2 Low. Can. Rev. de Leg. 334 K. B.; but see *Fulton v. Maccracken*, 18 Md. 528, 544.

Several states—New York, Ohio, California, Dakota, Arizona, Pennsylvania, and New Hampshire require registration of some kind; and Mississippi, Virginia, and West Virginia—regulate the use of the firm name in the sign, and in several there are statute restrictions upon the use of certain firm names. In three, no partner may transact business in name of a partner not interested in the firm,—New York, Georgia, and Louisiana. Two—New York and Louisiana—forbid the use of "& Co." or "and company," unless representing an actual partner.

"& Co." creates a rebuttable presumption of an unnamed partner. *Whitlock v. McKechnie*, 1 Bosw. 427; *Lunt v. Lunt*, 8 Abb. New Cas. 76.

The New York statute being highly penal, has been held not to apply where A.'s wife was his only "& Co.," nor to prevent partner recovering from carrier for negligence in transporting goods shipped in the illegal name, and in similar cases. *Zimmerman v. Erhard*, 83 N. Y. 74; *Wood v. Erie R. R. Co.*, 72 N. Y. 196; s. c. 28 Am. Rep. 125; *Adams v. Adams*, 7 Abb. New Cas. 292 (see note); *Sparrow v. Cohn*, 109 Penn. St. 359; *Thompson v. Gray*, 11 Daly, 183; *Crawford v. Collins*, 45 Barb. 269; *Gay v. Seibold*, 97 New York, 472; s. c. 49 Am. Rep. 533; *Wright v. Hooker*, 10 N. Y. 51; *Kent v. Mojonier*, 36 La. Ann. 259; *Lane v. Arnold*, 13 Abb. New Cas. 73. Nor does it apply to co-partnerships located and doing business in other counties or states. *Stoddard v. Key*, 62 How. Pr. 137; *Succession of Bofenschien*, 29 La. Ann. 711. Nor to the use of a fictitious name ending in "company," e.g. *Union Towing Co., Eureka Co., &c*; *Gay v. Seibold*, *supra*.

In Mississippi, Virginia, and West Virginia, by statute "& Co." must be used, or the partnership property in the hands of one dealing in his own name only will be deemed his, and liable for his debts. *Gumbel v. Koon*, 59 Miss. 264.

In Massachusetts there must be consent to the use of a deceased or retired partner's name; and in New York there must be publication of the intent to use name of deceased partner. See *Solier v. Johnson*, 111 Mass. 238.

Notwithstanding the adoption of a firm name proceedings by and against the firm must be by and against the partners as individuals. *Crawford v. Collins*, 45 Barb. 269; s. c. 30 How. Pr. 398; *Lanier v. The Mayor*, 59 Ga. 187; *Marlen v. Johnson*, 8 Daly, 541; *Haskins v. D'Este*, 133 Mass. 356.

The partnership business must be done under the firm name or one of the firm names if a firm name has been adopted. *Uhler v. Browning*, 28 N. J. L.

may be registered as shareholders in the name of their firm (*i*): and under the Copyright act, 5 & 6 Vict. [*113] c. 45, * and Engravings act, 8 Geo. II. c. 13, § 1, it is sufficient to register a book in the name of the firm (*j*), or to print the name of the firm of proprietors under the engravings (*k*).

Effect of change amongst the partners.—But as the name of a firm is only a conventional mode of designating the persons composing it, any variation amongst these persons is productive of a new signification of the name.

Legacy to a firm.—If, therefore, a legacy is left to a firm, the legacy is payable to those who compose the firm at the time the legacy vests (*l*); and if a legacy is left to the representatives of an old firm, it will be payable to the executors

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| <p>(<i>i</i>) Weikersheim's case, 8 Ch. 831.
 (<i>j</i>) Weldon v. Dicks, 10 Ch. D. 247.
 (<i>k</i>) Rock v. Lazarus, 15 Eq. 104.
 (<i>l</i>) See Stubbs v. Sargon, 2 Keen, 255, and 3 M. & Cr. 507. In May-</p> | <p>berry v. Brooking, 7 De G. M. & G. 673, a legacy of a debt due to A. was held to pass A.'s interest in a debt due to him and his co-partners. See also <i>Ex parte</i> Kirk, 5 Ch. D. 800.</p> |
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79; Drake v. Elwyn, 1 Caines, 184; Mershon v. Hobensack, 22 N. J. L. 372; Haskell v. Champion, 30 Mo. 136.

In case of slight variations from the true firm name, the jury are to decide whether the difference is substantial. Winship v. Bank of U. S., 5 Pet. 529; Tilford v. Ramsey, 37 Mo. 563; Moffatt v. McKissick, 8 Baxter, 517; Mifflin v. Smith, 17 S. & R. 165.

The presumption of partnership from a firm name indicating it is very slight and will not be allowed to defeat an action by B., an attorney, for services and disbursements, brought in his own name only, by showing that the services were rendered in the joint names of the attorney and E., an alien, and evidence of a single declaration, not giving the language used, by the plaintiff that such other person was his partner. In one of the cases in which the services sued for were rendered it appeared that the writ was in B.'s handwriting, the attorney's certificate and directions to the office were signed by B., the writ was indorsed by B. & E. and was entered in the names of B. & E. In the other case the answer was signed by J. P. B. & Wm. E. as attorneys for the defendant and certified by J. P. B. & Wm. E., the certificate being in the handwriting of E., and an agreement for reference of the action was signed by J. P. B. and B. & E., and it appeared that the charges in the Clerk of the Court's account against B. were against B. & E. Bishop v. Hall, 9 Gray, 430.

Mode of signing firm name. A. & Co. by A. Jr. imports to be the signature of the firm by A. Jr., not that A. Jr. is a partner. Dowling v. Eastwood, 3 Ont. Q. B. 376; and see Staats v. Howlett, 4 Den. 559; Tucker Manuf'g Co. v. Fairbanks, 98 Mass. 101; Caldwell v. Sithens, 5 Blackf. 99; Bank of British No. America v. Hooper, 5 Gray, 567; Walker v. Wait, 50 Vt. 668; Doty v. Bates, 11 Johns. 544; Story, Partn. 7th ed. § 202; Collyer, Partn. Bk. 2, c. 2, § 2.

of the last survivor of the partners constituting the firm alluded to, and not to its successors in business (*m*).

Advances to a firm.—Again, if trustees are authorised to lend money to a firm, and, after the death or retirement of one of the members, the trustees lend to the remaining members, this, it seems, would be a breach of trust on the part of the trustees (*n*).

Agency.—An authority given to two partners to insure in their names does not authorise an insurance in the names of themselves and a third person afterwards taken into partnership with them (*o*). So, if there be a firm, A., B. and C., and it has an agent D., and C. retires from the firm, though D. may continue the agent of the firm, he is no longer the agent of C., but only of A. and B. (*p*). In *Tasker v. Shepherd*, two partners had appointed an agent for four years and a half. One of the partners having died before the expiration of that time, it was held that the surviving partner was under no obligation to continue the agent in his employ. The Court held that the appointment had reference to the existing partnership only, * and that [*114] the contract was intended to be for four years and a half, provided the parties so long lived (*q*).¹

Offices held by a firm.—Upon the same principle—namely, that the name of the firm is only a conventional name for its members—if a firm is appointed by its mercantile name to any office, *e.g.*, the office of trustee, guardian or executor, the partners in the house at the time of its appointment to the office, are the persons who, in point of law, are considered as filling it (*r*). The firm, as such, cannot hold an

(*m*) *Leak v. McDowall*, 3 N. R. 185, M. R.; *Kerrison v. Reddington*, 11 Ir. Eq. 451. See *Greville v. Greville*, 27 Beav. 594.

(*n*) See *Fowler v. Raynal*, 2 De G. & Sm. 749, and 3 M. & G. 500.

(*o*) *Barron v. Fitzgerald*, 6 Bing. N. C. 201. But of course a continuance of the authority may be inferred from the dealings of the

person giving it with the changing firms. See *Pariente v. Lubbock*, 8 De G. Mc. & G. 5.

(*p*) See *Jones v. Shears*, 4 A. & E. 832.

(*q*) *Tasker v. Shepherd*, 6 H. & N. 575.

(*r*) *De Mazar v. Pybus*, and *Knudson v. Pybus*, 4 Ves. 649.

¹ A contract of hiring by a commercial traveller with a firm is ended by the death of one of the partners. *Burnet v. Hope*, 9 Ont. R. 10.

A surviving partner is bound by the covenant of himself and his deceased partner to teach an apprentice until the end of the term for which he was apprenticed. *Connell v. Owen*, 4 Ont. C. P. 113.

office; nor can rights, personal to the members of a given firm, be exercised by new members who may be introduced into it (*s*), nor by its successors in business (*t*); unless they are clearly intended to exercise them.

Protection of name.—The name by which a firm is known is not of itself the property of the firm, and there is nothing at common law to prevent persons from carrying on business in partnership under any name they please (unless perhaps it purports to be the name of a corporation) (*u*).

But one firm is not at liberty to mislead the public by so using the name of another firm as to pass off themselves or their goods for that other, or for the goods of that other (*x*). Moreover, an established firm can prevent a company from registering itself under the name of the firm (*y*).

Name a trade mark.¹—The name of a firm may moreover be registered as a trade mark for particular classes of goods (46 & 47 Vict. c. 57, § 64 and 65); and if so registered, it is capable of being assigned in connection with the good will of the firm, § 70. Registration is equivalent [*115] to antecedent use, § 75. Provision is made *to prevent the improper registration of the same trade mark by several persons, § 72.

Changes and mistakes in name of a firm.—Speaking generally, the rights and liabilities of a firm cannot be affected by a change in its name unaccompanied by a change amongst its members. Regarded as a trade mark, and in connection with goodwill, a change in name may be attended by important consequences, but in other respects it matters little; for so long as there is no change amongst the members, the different names they assume all denote the same persons. It must not, however, be concluded that one partner can bind his co-partners by using a name under which he and they do not carry on business, and the use of which they have not sanctioned; and as will be seen hereafter, he has no power

(s) See *Barron v. Fitzgerald*, 6 Bing. N. C. 201; *Stevens v. Benning*, 1 K. & J. 168.

(t) *Hole v. Bradbury*, 12 Ch. D. 886.

(u) See as to this, *ante*, p. 93.

(x) See *Lee v. Haley*, 5 Ch. 155; *Massam v. Thorley's Cattle Food Co.*, 14 Ch. D. 748, reversing s. c. 6 Ch. D. 574; *Burgess v. Burgess*, 3

D. G. M. 896. See also *Singer Machine Manufactures v. Wilson*, 3 App. Ca. 376, and *Singer Man. Co. v. Loog*, 18 Ch. D. 395, and 8 App. Ca. 15; *Braham v. Beachum*, 7 Ch. D. 848. (y) *Hendriks v. Montagu*, 17 Ch. D. 638. The Copyright Acts have no application to mere names, see *Maxwell v. Hogg*, 2 Ch. 307.

¹ *Hallett v. Cumston*, 110 Mass. 29; *Solier v. Johnson*, 111 id. 238.

so to bind them (*z*). Moreover, a mistake in the name of a firm may be important, *e.g.*, under the Copyright act, if the owners of a copyright carry on business in partnership and are not registered properly, they cannot sue for an infringement (*a*).

2. *In legal proceedings.*

Actions by and against firms.—The non-recognition of the firm, in a mercantile sense, was very apparent when it had to sue or be sued at law: for,

1. A firm could neither sue nor be sued otherwise than in the names of the partners composing it (*b*).¹

2. Consequently, no action could be brought by the firm against one of its partners, nor by one of its partners against it; for in any such action one person, at least, would appear both as plaintiff and as defendant, and it was considered absurd for any person to sue himself even in form (*c*).²

3. For the same reason, one firm could not bring an action

(*z*) See as to this, *Kirk v. Blurton*, 9 M. & W. 284, and other cases of that class, noticed *infra*, book ii. Ch. 1, § 5.

(*a*) *Low v. Routledge*, 1 Ch. 42.

(*b*) See *infra*, book ii. c. 3. A corporation may sue in a name it has acquired by reputation. The

Dutch West India Co. v. Moses, 1 Str. 612. As to actions by individuals who have assumed to act as a corporation, see *Cooch v. Goodman*, 2 Q. B. 580.

(*c*) *De Tastet v. Shaw*, 1 B. & A. 664; *Richardson v. The Bank of England*, 4 M. & Cr. 171, 172.

¹ It is a general rule, except where another course is provided by legislation, as in Iowa and Missouri, that all the members of the firm must join in an action at law against third persons and be joined in an action by third persons against the firm. *May v. Western Union Tel. Co.*, 112 Mass. 90; *Blackwell v. Reid*, 41 Miss. 102; *Urton v. Hunter*, 2 W. Va. 83; *Allen v. Maddox*, 40 Iowa, 124; *Osburn v. Farr*, 42 Mich. 134; *Slutts v. Chaffee*, 48 Wis. 617; *Moore v. Burns*, 60 Ala. 269; *Reed v. Hanover Branch R. R. Co.*, 105 Mass. 303; *Fitzgerald v. Grimmell*, 64 Iowa, 261; *Bigelow v. Reynolds*, 36 N. W. Rep. 95.

In equity the rule is otherwise, and it is sufficient if all the parties in interest are made parties to the suit on one side or the other. *Jones v. Bliss*, 45 Ill. 143; *Chapman v. Evans*, 44 Miss. 113.

And dormant, unknown, or nominal partners need not be joined as plaintiffs or defendants. *McDonald v. Cummings*, 2 Pugs. (N. B.) 282; *Barstow v. Gray*, 3 Me. 409; *Desha v. Holland*, 12 Ala. 513; *Wright v. Herrick*, 125 Mass. 154; *Waite v. Dodge*, 34 Vt. 181; *Speake v. Prewitt*, 6 Tex. 252; *Howe v. Savory*, 51 N. Y. 631. Nor representatives of deceased partners. *Bolkow v. Foster*, 24 Ont. Chy. 333; 25 id. 476.

² An action at law lies for a breach of the agreement to form a partnership. *Hill v. Palmer*, 56 Wis. 123; s. c. 43 Am. Rep. 703.

Also for breach of covenant in the partnership agreement where damages belong exclusively to the plaintiff and can be assessed without an accounting. *Hill v. Palmer*, 56 Wis. 123; s. c. 43 Am. Rep. 703.

[*116] *against another if there were one or more partners common to both firms (*d*).

So, if one member of a firm drew a bill on the firm, and the bill was accepted in the name of the firm, the drawer could not sue the firm on such a bill; for he, as one of the firm, was liable as an acceptor, and ought, therefore, to be a defendant to the action in which he was plaintiff (*e*).

(*d*) *Bosanquet v. Wray*, 6 Taunt. 149. Compare *Beecham v. Smith*, 597; *Mainwaring v. Newman*, 2 Bos. E. B. & E. 442, where the note sued upon was the several note of the & P. 120. defendants.

(*e*) See *Neale v. Turton*, 4 Bing.

An agreement among partners that one of them shall advance to the others their share of the necessary capital is not a partnership agreement and an action will lie on it. *Walker v. Born*, 6 Victoria L. R. (L.) 447; *Lee v. Roberts*, 5 id. 26.

A partner cannot maintain an action against his co-partners as indorsers of a note made for a purpose directly relating to the partnership. *Small v. Riddel*, 31 Ont. C. P. 373.

A member of an unincorporated company, lending with the company's assent from the firm fund to another member and taking from him a promissory note payable to himself individually, for repayment can recover on the note, notwithstanding the funds were advanced from the common stock. *Comer v. Thompson*, 4 Ont. K. & Q. B. 256, old series.

An action cannot be maintained by one partner against another on an offer made on arranging for a dissolution to pay a certain sum if he was allowed to keep the books and collect the debts. *Burgess v. Fanning*, 4 Ont. K. & Q. B. 188, old series. Nor for "a balance due co-partner" entered in books before dissolution, without proof of promise to pay that balance. *Allan v. Garven*, 4 Ont. Q. B. 242; *Garven v. Allan*, 3 Ont. Chy. 238.

Executor who sells the whole partnership property against the will of surviving partners cannot be sued in trespass. *Strathy v. Crooks*, 2 Ont. Q. B. 51.

One partner cannot maintain trover against another for partnership property. *Smith v. Book*, 5 Ont. K. & Q. B. 556, old series.

The plaintiff having compiled a book, caused it to be printed, by a firm consisting of himself and defendant, on paper furnished by the firm, and the defendant having refused to give up to him the copies thus printed, he brought trover; *semble* that he could not recover for the property belonging to the firm and the defendant had as much right to retain as the plaintiff had to take.

There was evidence, however, of an agreement between them by which the copies had become the plaintiff's property, and as this view had not been fully submitted to the jury and the damages given for the plaintiff were excessive, a new trial was granted. *Doupe v. Stewart*, 28 Ont. Q. B. 192.

Otherwise as to action against fraudulent vendee of partner. *Fox v. Rose*, 10 Ont. Q. B. 16. And when the sale is plainly intended not for the objects of the partnership, as to pay debts, etc., but to deprive plaintiff of all interest in the property or proceeds. *Rathwell v. Rathwell*, 26 Ont. Q. B. 179.

The right of a partner who has paid a judgment rendered against the partners jointly and severally is to have an action *pro socio* and not to be subrogated to the plaintiff's rights against his partner. *Leduc v. Turcat*, 5 Low. Can. J. 96.

M. & O. were partners with others in mining. At a company meeting M. was hired at certain wages to do certain work and O. was at the same meeting

The extent to which these rules have been modified by modern legislation will be examined hereafter (*f*). They are alluded to here in order to show the logical consequences which flow from the non-recognition of any such entity as a firm. In bankruptcy, however, the firm is often recognised, as will be seen hereafter.

Effect of change in a firm on its rights and liabilities.— Another most important consequence of the principle, that on any change amongst the persons composing a partnership there is in fact a new partnership, and not a mere continuation of the old one, is that although, upon a change in a firm, it may be agreed between the members of the old and new firms that the rights and obligations of the old shall devolve upon the new partners, this has no effect upon third parties unless they accede to it. As to them it is *res inter alios acta*, and there is no principle by virtue of which the existing rights or obligations of non-partners can be affected, either for better or for worse, by agreements to which they are strangers. This subject will be alluded to hereafter (*g*).

3. Partnership disabilities.

Disabilities of one partner affecting the firm.— Speaking generally, no person can do by his agent what he cannot do himself; and although each member of a firm is a principal as regards his own conduct, he is the agent of his co-partners; and he cannot therefore do for the firm what they cannot do. In other words, the disability of one of the partners affects the whole firm. Illustrations of this doctrine will * be found in Book II., Chap. III., § 1, relating [*117] to defences to actions by partners. Further illustrations are afforded by those cases which preclude a firm of solicitors or any of its members from doing work which one of the members cannot do (*h*).¹

(*f*) See *infra*, book ii. ch. 3.

(*g*) See *infra*, book ii. ch. 2, § 3.

(*h*) See *Duke of Northumberland v. Todd*, 7 Ch. D. 777, as to swearing affidavits.

appointed manager of the company. M. did the work and sued O. Held, that he could not maintain the action. *Oliver v. Meehan*, "Argus" Rep. 29 Mar. 1865 (Victoria). *Kerford v. Box*, Dig. p. 491.

¹ *Partners of auctioneer.*— Goods sold at auction and not taken by purchaser were afterwards resold at a loss and purchased by one who was a partner of

Again, there are rules in bankruptcy which prevent the partners of the trustee, registrar, or official receiver from doing various acts which they might do if they were not in partnership with him (*i*).

By 50 & 51 Vict. c. 58, § 40, no inspector of a coal mine can be a partner in it, nor can a partner of any land agent, mining engineer, &c., be an inspector.

4. *As regards sureties and securities.*

Effect of change in a firm on the position of its sureties.—It is a principle of the law of suretyship, that any act on the part of the principal creditor which alters the risk of the surety without his consent,¹ discharges him from future liability (*k*).

If, therefore, a person becomes surety to a firm, it is important to ascertain whether he clearly contemplated changes in the firm, and agreed to become surety to a fluctuating body or not. If he did, his liability is not discharged by any change amongst the members constituting the partnership at

(*i*) See Bank. act, 1883, §§ 88, 116 (2); sched. 1, r. 26; Bank. R. 1886, r. 56 (2), 113, 114.

(*k*) See, as to sureties, the note to *Arlington v. Merrick*, 2 Wms. Saund.

414. As to the discharge of apprentices and their sureties by a change in the firm to which they are bound, see *Lloyd v. Blackburne*, 9 M. & W. 363; *R. v. St. Martin's*, 2 A. & E. 655.

the auctioneer in another business totally distinct from that of auctioneer, and an action was brought by the auctioneer to recover from first purchaser the loss on the re-sale.

Held, that the second purchaser's partnership with the person who was auctioneer, but in an entirely distinct business, was no ground of objection to the suit. *Clarkson v. Noble*, 2 Ont. Q. B. 361.

¹ S. by indenture under seal became surety to the firm of C. & Sons for goods to be sold to one Q. and agreed to be a continuing security to said firm or to the member or members for the time being constituting said firm of C. & Sons for sales to be made by the said firm "or any member or members of the said firm of C. & Sons to the said Q. as long as they should mutually deal together." P. C. by his will appointed his sons, the other members of the firm, his executors, and they as such entered into a new agreement of partnership and continued to carry on the business under the same firm name of C. & Sons and subsequently transferred all their interest to a joint stock company. An action having been brought against S. for goods sold to Q. after the death of P. C. it was held reversing the judgment of the Court of Appeal, 11 Ont. App. R. 156; and restoring the judgment of the Common Pleas Division, 5 Ont. R. 189, that the death of P. C. dissolved the said firm of C. & Sons and put an end to the contract of suretyship. *Starrs v. The Cosgrave Brewing & M. Co.*, 12 Duval, 571, C. S. C., 1886.

the time he became surety (*l*); but if no such intention can be shown, then a contract of suretyship entered into with a firm will be deemed to be binding so long only as the firm remains unchanged (see 19 & 20 Vict. c. 97, § 4, on the next page); *and consequently any change in it [*118] whether by the death (*m*) or the retirement (*n*) of a partner, or by the introduction of a new partner (*o*), immediately puts an end to the surety's liability so far as subsequent events are concerned. In all such cases the surety's position and risk are altered, and whether he has in fact been damnified by the change or not, he has a right to say *non in hæc fœdera veni*.

Sureties for a firm. — Similar doctrines apply to cases where a person becomes surety *for* the conduct of a firm (*p*)¹

(*l*) Pease *v.* Hirst, 10 B. & C. 122; Metcalf *v.* Bruin, 12 East, 400, and 2 Camp. 422; and see Barclay *v.* Lucas, 1 T. R. 201, note; Kipling *v.* Turner, 5 B. & A. 261. In *Pariente v. Lubbock*, 8 De G. Mc. & G. 5, an authority to a firm of consignees, to recognise the consignor's son as his agent, was held to continue, notwithstanding changes in the firm, as long as the consignor continued his business connection with the firm.

(*m*) Holland *v.* Teed, 7 Ha. 50; Strange *v.* Lee, 3 East, 484; Weston *v.* Barton, 4 Taunt. 673; Pemberton

v. Oakes, 4 Russ. 154; Simson *v.* Cooke, 1 Bing. 452; Chapman *v.* Beckington, 3 Q. B. 703; Backhouse *v.* Hall, 6 N. R. 98, Q. B.

(*n*) Myers *v.* Edge, 7 T. R. 254; Dry *v.* Davey, 10 A. & E. 30; and see Solvency Mutual Guarantee Co. *v.* Freeman, 7 H. & N. 17.

(*o*) Wright *v.* Russell, 2 Wm. Blacks. 934.

(*p*) Bellairs *v.* Ebsworth, 3 Camp. 53; University of Cambridge *v.* Baldwin, 5 M. & W. 580; Simson *v.* Cooke, 1 Bing. 452; 19 & 20 Vict. c. 97, § 4.

¹ Liability of sureties for the default of H. does not extend to defaults of the firm of H. & Co. subsequently formed. White Sew. Mch. Co. *v.* Hines, 61 Mich. 423; Brandt Sur. § 338; 3 Kent Comm. 124; Dobbin *v.* Bradley, 17 Wend. 422; Leeds *v.* Dunn, 10 N. Y. 469; Equit. Life Assur. Soc. *v.* Coats, 44 Mich. 260; Peck *v.* Miller, 39 id. 595; Johnson *v.* Township of Kimball, 39 id. 187; Todd *v.* School Dist., 40 id. 294; Detroit Sav. Bk. *v.* Ziegler, 49 id. 157; Parham Sew. Mch. Co. *v.* Brock, 113 Mass. 194; Boston Hat Mfy. *v.* Messinger, 2 Pick. 223; Palmer *v.* Bagg, 56 N. Y. 523.

A person became surety for another for the due discharge of his duty as agent in the purchase of wheat for a mercantile firm. Afterwards the agent and his principals entered into an agreement of partnership, and during the continuance thereof he became indebted to his co-partners in the sum of £750; and the surety having been called upon executed a confession of judgment for the amount of his principal's indebtedness, in ignorance, as he alleged, of the fact that the agency had ceased and a partnership been formed. Upon a bill filed to enforce the judgment against the surety the court, under the circumstances, directed a reference to ascertain what, if any, portion of the debts for which the assignment was given arose in respect of dealings during the agency, reserving further directions and costs; or if the plaintiffs should decline this reference then that the bill should be dismissed with costs. Gooderham *v.* The Bank of Up. Can., 9 Ont. Ch. 39.

Moreover, a person who becomes surety for another is not necessarily surety for his conduct as a partner, and obviously not for the conduct of himself and his co-partner (*q*).

Effect of incorporation. — Again, if a person becomes surety to several people for the conduct of a servant in their employ, and those people are afterwards incorporated, the surety is discharged: for the person created by the act of incorporation is different from the persons in whose employ the servant was, and with whom the surety contracted (*r*). On precisely similar grounds it is conceived that a person who becomes surety to a corporation for the conduct of one of its servants would be discharged by the amalgamation of that corporation with another; for the two together would be a different body from either of its amalgamated members (*s*). But a mere change of name consequent on registration with limited liability has not this effect (*t*).

[*119] * **Mercantile Law Amendment Act.** — The doctrines established in the foregoing cases have been expressly sanctioned by the legislature; it being enacted by the Mercantile Law Amendment Act (*u*), that: —

“No promise to answer for the debt, default or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise.”

Effect of change in firm on its securities. — Questions nearly akin to those just alluded to, arise where securities have been deposited with bankers to secure future advances, and

(*q*) *The London Assurance Co. v. Bold*, 6 Q. B. 514; *Montifiore v. Lloyd*, 15 C. B. N. S. 203, where the partnership was known to the surety.

(*r*) *Dance v. Girdler*, 1 Bos. & Pull. N. R. 24.

(*s*) In *The Eastern Union Rail. Co. v. Cockrane*, 9 Ex. 197, and *The London, Brighton, and South Coast Rail. Co. v. Goodwin*, 3 Ex. 320, the

surety was not discharged; but the statute amalgamating the two companies contained an express provision on the subject.

(*t*) *Groux's Soap Co. v. Cooper*, 8 C. B. N. S. 800.

(*u*) 19 & 20 Vict. c. 97, § 4. See on this section, *Backhouse v. Hall*, 6 B. & Sm. 507, and 6 N. R. 98, Q. B.

a change has occurred in the banking firm before the making of some of the advances. *Primâ facie*, the securities extend only to those advances which are made by the firm whilst its members continue the same as when the securities were deposited (*x*). And similarly, if a partner pledges his separate property for future advances to be made to his firm, and he afterwards dies, an advance made after his death to his surviving partners will not be chargeable against the property pledged (*y*). It has even been held that if a person deposits deeds as a security for advances to be made to *him*, the security does not cover advances made to him and his partners (*z*).

Equitable mortgages.—However, it is established that an equitable mortgage by deposit of title deeds may be extended, even by parol, to cover advances made after a change in the firm with which the deeds are lodged (*a*). And although a legal mortgage to a firm *cannot be converted into an equitable mortgage merely by parol (*b*), it may be so converted by a written agreement, and may as an equitable mortgage become available as a security for advances made after a change in the firm to which the legal mortgage was originally given (*c*). Owing to these doctrines a security given to a firm for advances to be made by it, is, upon a change in the firm, readily made a continuing security; and a slight manifestation of intention on the part of the borrower that it should so continue, will enable the new firm to hold the securities until the advances made by itself as well as those made by the old firm, have been repaid (*d*).

Lien of solicitors.—The lien which a firm of solicitors has on the deeds, &c., of its clients, is not lost by a mere change in the firm (*e*). But a solicitor's lien only attaches where

(*x*) See *per* Lord Eldon in *Ex parte Kensington*, 2 V. & B. 83.

(*y*) *Bank of Scotland v. Christie*, 8 Cl. & Fin. 214.

(*z*) *Ex parte Mackenna*, 3 De G. F. & J. 629; *Ex parte Freen*, 2 Gl. & J. 246. See, too, *Chuck v. Freen*, 1 Moo. & M. 259. These cases turn on the terms of the memoranda of deposit, and on the circumstances under which the securities are given.

(*a*) *Ex parte Lloyd*, 1 Gl. & J.

389; *Ex parte Lane*, De Gex, 300; and see *Ex parte Nettleship*, 2 M. D. & De G. 124.

(*b*) *Ex parte Hooper*, 2 Rose, 328.

(*c*) *Ex parte Parr*, 4 D. & C. 426.

(*d*) See *Ex parte Kensington*, 2 Ves. & B. 79; *Ex parte Marsh*, 2 Rose, 239; *Ex parte Loyd*, 3 Deac. 305; *Ex parte Alexander*, 1 Gl. & J. 409.

(*e*) *Pelly v. Wathen*, 7 Ha. 351, affirmed 1 De G. Mc. & G. 16.

the papers on which the lien is claimed to have come to the possession of the very persons to whom the client is legally indebted: whence it follows that papers which come into the possession of a firm after the introduction of a new partner (*f*) or the retirement of an old one (*g*) cannot be retained for a debt due before the change in the firm took place. The death of a partner is not, however, it is conceived, equivalent to retirement, for the survivors become the legal creditors; and there is, therefore, no reason why they should not have a lien for a debt due to them and their deceased partner on papers coming into their possession after his death.

A dissolution of a partnership between solicitors operates as a discharge by them of their client; and any lien they may have on his papers is subject to his right to have them handed over to a fresh solicitor, for the purpose of enabling him to finish business of the client pending at the time of dissolution (*h*).

- (*f*) *Re Forshaw*, 16 Sim. 121; (*h*) *Griffiths v. Griffiths*, 2 Ha. 587;
Pelly v. Wathen, 7 Ha. 351. *Rawlinson v. Moss*, 7 Jur. N. S.
(*g*) *Vaughan v. Vanderstegen*, 2 1053, V.-C. W.
Drew. 409.

* CHAPTER VII.

[*121]

OF THE DURATION OF CONTRACTS OF PARTNERSHIP — OF
PARTNERSHIPS AT WILL AND FOR A TERM.

Partnerships at will and for a term. — A contract of partnership is determinable at the will of any one of the persons who have entered into it, provided it has not been agreed that the contract shall endure for a specified time.¹

Prima facie, partnerships are at will. — In other words, the result of a contract of partnership is a partnership at will, unless some agreement to the contrary can be proved (*a*). Such an agreement may be established as well by direct evidence as by implication from the acts of the partners; and it is not possible to lay down any rule by means of which the intention of the partners on this head can be certainly ascertained, where no express agreement has been come to. One or two points, however, on the subject have been decided, and demand notice.

Effect of existence of debts. — The mere fact that a firm has incurred debts, and charged its assets for their payment, is no proof of an agreement that the firm shall continue until its debts are paid, for those debts may be paid as well after as before a dissolution (*b*).

Effect of taking a lease. — Again, the fact that the partners have, for partnership purposes, taken land on lease for a

(*a*) See *per Parke, J.*, in *Heath v. Sanson*, 4 B. & Ad. 175; *Frost v. Moulton*, 21 Beav. 596, and the cases cited in the following notes.

(*b*) See *King v. The Accumulative Assurance Co.*, 3 C. B. N. S. 151.

¹ A partnership for an indefinite period is in law a partnership at the will of the partners, and either partner may withdraw when he pleases, and dissolve the partnership, if he acts without any fraudulent purpose. *Carlton v. Cummins*, 51 Ind. 478; *McElvey v. Lewis*, 76 N. Y. 373; *Berry v. Folkes*, 60 Miss. 576; *Fletcher v. Reed*, 131 Mass. 312; *Pearce v. Ham*, 113 U. S. 585, 28 L. ed. 1067; *Howell v. Harvey*, 5 Ark. 270; *Walker v. Whipple*, 58 Mich. 476; *Lawrence v. Robinson*, 4 Colo. 567; *Sharpe v. Johnston*, 59 Mo. 557; *contra*, *Morris v. Peckham*, 51 Conn. 128, where reasonable time was allowed, and *Gates v. Fraser*, 6 Ill. App. 229, where a partnership was construed to be for the term of a patent.

term of years, is not proof of an agreement that the partnership between them shall subsist for the same period. This has been decided on several occasions (*c*), and the reasons are thus given by Lord Eldon in *Crawshay v. Maule*, a leading case upon the subject.

"Without doubt, in the absence of express there may be an implied contract as to the duration of a partnership, but I must contradict all authority *if I say that whenever there is a partnership, the purchase of a leasehold interest of longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument the Court, holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold that if the partners purchase a fee simple, there shall be a partnership for ever. It has been repeatedly decided that interests in land purchased for the purpose of carrying on trade are no more than stock in trade" (*d*).

Partnerships continued after their terms are expired. — Further, where a partnership, originally entered into for a certain number of years, is continued after their expiration, and there is no evidence as to the additional time for which the partnership was to last, it is treated as having become a partnership at will, and not as having been renewed for another definite period (*e*).¹

Duration of sub-partnerships. — So, if one of several partners forms a sub-partnership with a stranger, the fact that the principal partnership has been entered into for a certain number of years is no proof that the sub-partnership was intended to last for the same number of years, or for as

(*c*) *Featherstonhaugh v. Fenwick*, 17 Ves. 307; *Jefferys v. Smith*, 1 Jac. & W. 301; *Alcock v. Taylor*, Tam. 506; *Burdon v. Barkus*, 3 Giff. 412, and on appeal, 4 De G. F. & J. 42.

(*d*) *Crawshay v. Maule*, 1 Swanst. 509.

(*e*) *Neilson v. Mossend Iron Co.*, 11 App. Ca. 298; *Featherstonhaugh v. Fenwick*, 17 Ves. 307; *Booth v. Parkes*, 1 Moll. 465. See, also, *Cuffe v. Murtagh*, 7 Ir. L. R. 411.

¹ *Bradley v. Chamberlin*, 16 Vt. 613; *Frederick v. Cooper*, 3 Iowa, 171; *United States Bank v. Binney*, 5 Mason, 176; *Sangston v. Hack*, 52 Md. 173; *Wilson v. Lineberger*, 83 N. C. 524.

A co-partnership contract to fish, each in a distinct berth and each finding his own seine, boat, and gear, was found by the Court to be limited to the taking of a school of fish in each berth.

Defendant in his berth caught 14 bbls., and gave plaintiff 7 bbls. Plaintiff in his berth caught 10 bbls., and gave defendant 5 bbls., and then abandoned his berth and went elsewhere to fish. Defendant continuing in his berth caught 250 bbls., of which plaintiff claimed half.

Held, plaintiff not entitled to participate in defendant's catch. *Fawson v. Noonan*, Russell's N. S. Eq. Rep. 377.

many of them as were unexpired when the sub-partnership was formed (*f*).

Implied terms of duration. — On the other hand, in *Wheeler v. Van Wart* (*g*), a company, the duration of which was not expressly fixed, was held to be intended to last at least until after a day appointed in its deed of settlement for the holding of a general meeting. And in *Reade v. Bentley* (*h*), it was considered that an agreement to the effect that a publisher should defray the expenses of a work written by an author, and should receive a per centage on the gross amount of sale, and that the net profits of each edition should be divided equally between both parties, amounted to an agreement for a joint adventure between the author and the publisher for so long as might be necessary to dispose of a complete edition; and that the publication of every new edition prolonged the partnership until that edition should *be disposed of; but that when any edition was [*123] exhausted either party was free to discontinue the joint adventure.

Causes of dissolution. — The right to rescind a partnership contract for fraud or misrepresentation will be discussed hereafter in Book III.; and the right to dissolve a partnership or to have it dissolved, and the consequences of its dissolution will be examined in Book IV.

(*f*) *Frost v. Moulton*, 21 Beav. 596.

(*g*) 9 Sim. 193, and better in 2 Jur. 252.

(*h*) 4 K. & J. 656; and 3 ib. 271.

OF THE RIGHTS AND OBLIGATIONS OF PART-
NERS AS REGARDS NON-PARTNERS.

CHAPTER I.

OF THE LIABILITIES OF PARTNERS FOR THE ACTS OF
EACH OTHER.

SECTION I.—GENERAL PRINCIPLES OF AGENCY AS APPLIED
TO ORDINARY PARTNERSHIPS.

Each partner the agent of the firm.—Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way; and the firm is responsible for whatever is done by any of the partners when acting for the firm within the limits of the authority conferred by the nature of the business it carries on (*a*).¹ Whatever, as between the partners themselves, may be the limits set to each other's authority, every person not acquainted with those limits is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, in the way in which that business is ordinarily carried on by other people (*b*). But no person

(*a*) The case is different with mere part-ownerships, *Barton v. Williams*, 5 B. & A. 395; *Helme v. Smith*, 7 Bing. 709.

(*b*) See *per James, L. J.*, in *Baird's case*, 5 Ch. 733, and *per Parke, B.*, in *Hawken v. Bourne*, 8 M. & W. 710.

The fact that one partner ordinarily attends to one branch of the business does not prevent his binding the firm when acting out of his own department, *Morans v. Armstrong*, *Arm. M'Artn. & Ogle, Ir.* N. P. Rep. 25.

¹ It is a fundamental feature of a partnership that each member of a firm is the agent of the firm with authority to bind it in all matters necessary and proper to the management of the particular business which is carried on by the firm. In *Woodward v. Winship*, 12 Pick. 430, evidence was held admissible

is entitled to assume that any partner has a more extensive authority than that above described.

to show that a partner who did an act *prima facie* not within the scope of his authority, was warranted in so doing by the course of the firm in the management of their business, and that the other partners were responsible for his acts, done in good faith and with reasonable discretion.

And if his partners knew of purchases for the use of the firm, and did not object, they would be liable on a note given for the goods though the goods were not such as the firm was engaged in the manufacture and sale of. *Woodward v. Winship, supra*. In *Winship v. Bank of United States*, Chief Justice Marshall said: "This is a general power, essential to the well-conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and if it be so, the partner who purchases on credit in the name of the firm must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of co-partnership are perhaps never published. They are rarely if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine those articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners; but ought not to affect those to whom they are unknown and who trust to the general and well-established commercial law." *Winship v. Bank of United States*, 5 Pet. 529, 8 L. ed. 216. See also *Le Roy v. Johnson*, 2 Pet. 186, 7 L. ed. 391; *Kimbro v. Bullitt*, 22 How. 256, 16 L. ed. 313; *Wheeler v. Sage*, 1 Wall. 518, 17 L. ed. 646.

The business of buying and selling cattle is such as to authorize a partner to borrow money for the use of the partnership. *Smith v. Collins*, 115 Mass. 388.

And the right of a partner to borrow money may be exercised by signing notes, accepting drafts, indorsing notes and checks, and by assigning accounts and mortgaging or pledging the property of the firm, with the limitation that it is done within the usage of the trade in which the partnership is engaged, and is necessary for its business. Story on Partn. § 102; 3 Kent, 40; *Smith v. Collins, supra*; *Day v. McLeod*, 18 Ont. Q. B. 256; *Todd v. Jackson*, 75 Ind. 272; *Barrett v. Russell*, 45 Vt. 43; *Pahlman v. Taylor*, 75 Ill. 629; *Silverman v. Chase*, 90 id. 37; *Roney v. Buckland*, 4 Nev. 45; *Lamb v. Durant*, 12 Mass. 54; *Shaw v. McGregory*, 105 Mass. 96.

One partner may bind the partnership by a sealed instrument, if the instrument would be valid without a seal. *Bloomley v. Grinton*, 9 Ont. Q. B. 455; *Hutchinson v. Johnson*, 4 Allen (N. B.) 40; *Gibson v. Worden*, 14 Wall. 244, 20 L. ed. 797; *Schmertz v. Shreeve*, 62 Penn. St. 457; s. c. 1 Am. Rep. 439; *Walsh v. Lennon*, 98 Ill. 27, 38 Am. Rep. 75. See *post*, p. 137 and note.

And where a partner was authorized to obtain an indorser to a note and get it discounted, it was held that this empowered him to mortgage all the stock in trade to secure such indorser. *Patterson v. Maughan*, 39 Ont. Q. B. 371.

The consequences of this principle are:—

General rules.—1. That if an act is done by one [*125] partner on behalf of the * firm, and it was necessary for carrying on the partnership business in the ordinary way, the firm will *primâ facie* be liable, although in point of fact the act was not authorised by the other partners.

2. That if an act is done by one partner on behalf of the firm, and it was not necessary for carrying on the partnership business in the ordinary way, the firm will *primâ facie* be not liable.

In the first case the firm will be liable unless the one partner had in fact no authority to bind the firm, and the person dealing with him was aware of that want of authority; whilst in the second case the firm will not be liable unless an authority to do the act in question, or some ratification of it, can be shown to have been conferred or made by the other partners (*c*).

Secret partnerships.—The doctrine that each member of an ordinary firm is its implied agent for the transaction of its business in the ordinary way, is generally laid down without qualification.

Authority of dormant partner.—But it is questionable whether this rule applies to a case in which a person who happens to be a member of a firm, but who is not known to be such, and who has in fact no authority to act for it, takes upon himself so to do. Real authority is excluded by hypothesis; and it is difficult to see from what, in such a case, any authority can be implied. If, indeed, he was known to be a partner, whether by his own representations or otherwise, his authority to act for the firm would be properly inferred. But the case supposed excludes all knowledge of his position, and under such circumstances it is conceived there can be no apparent as distinguished from real authority (*d*).

(*c*) See *Dickinson v. Valpy*, 10 B. & C. 128, and *Orellin v. Brook*, 14 M. & W. 11, where there was sufficient ratification.

(*d*) See the judgment of Cockburn, C. J., in *Nicholson v. Ricketts*, 2 E. & E. 524, and of Cleasby, B., in *Holme v. Hammond*, L. R. 7 Ex. 233.

In making a contract which is within the scope of the partnership business, each partner is presumed to be the authorized agent of all, and it is of no consequence as to its validity as a partnership contract, what the secret understanding of the partners may have been as to the powers of each. *Andrews v. Congar*, 102 U. S. 26, L. ed. 90.

Liability of dormant partners. — Again, with respect to the liability of dormant partners: a distinction must be drawn between — first, undisclosed principals who carry on a business by partners or agents; and, secondly, persons who simply share the profits of a business carried on by others on their own account, *i.e.*, as principals only, and * not as agents for those who share their profits. [*126] In the first case the dormant partners are liable for whatever may be done by their partners and agents in the course of transacting the business in the ordinary way; but in the second case the so-called dormant partners are not principals at all, the persons who carry on their business do not carry it on as their agents either really or apparently, and the doctrines applicable to undisclosed principals are altogether excluded (*e*).

Necessity the limit of authority. — It will be observed, that what is necessary to carry on the partnership business in the ordinary way, is made the test of authority where no actual authority or ratification can be proved.¹ This is conformable to the most recent and carefully considered decisions; but by adopting it the liability of a firm for the acts of its co-partners is not so extensive as non-lawyers sometimes imagine. The act of one partner to bind the firm must be *necessary* for the carrying on of its business; if all that can be said of it was that it was convenient, or that it facilitated the transaction of the business of the firm, that is not sufficient in the absence of evidence of sanction by the other partners (*f*).

Extraordinary necessity. — Nor it seems will necessity itself be sufficient if it be an extraordinary necessity. What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is the test; and therefore, in a case where the nature of the business was one in which there was no necessity to borrow money to

(*e*) This distinction is rendered necessary by the decision of the House of Lords, in *Cox v. Hickman*. See *ante*, pp. 30 *et seq.*

(*f*) See *Brettel v. Williams*, 4 Ex. 630.

¹ The power of a partner to bind the firm in “necessary” dealings with third persons, imports such transactions as are ordinary and usual for trading partnerships in the same line of trade. It is in this sense that the term “necessary” is used in defining the powers of partners. *Seaman v. Ascherman*, 57 Wis. 547; *Woodward v. Winship*, 12 Pick. 437; *Berry v. Folkes*, 60 Miss. 576; *Lamb v. Durant*, 12 Mass. 54.

carry it on under ordinary circumstances and in the ordinary manner, the Court held the firm not liable for money borrowed by its agent under extraordinary circumstances, although money was absolutely requisite to save the property of the firm from ruin (*g*). This case is an authority for saying that a power to do what is usual does not include a power to do what is unusual, however urgent; and although in the case referred to, the money was not borrowed by a partner, but by a person who was only an agent of the firm, the decision would, it is apprehended, have [*127] *been the same if he had been a partner.

Discretion in urgent cases.—For notwithstanding the fact that every partner is to a certain extent a principal as well as an agent, the liability of his co-partners for his acts can only be established on the ground of agency. As their agent he has no discretion except within the limits set by them to his authority, and the fact that he is himself, as one of the firm, a principal, does not warrant him in extending those limits, save on his own responsibility (*h*).

Nature of the business the test of necessity.—The question whether a given act can or cannot be said to be necessary to the transaction of a business in the way in which it is usually carried on, must evidently be determined by the nature of the business, and by the practice of persons engaged in it.¹ Evidence on both of these points is therefore necessarily admissible, and, as may readily be conceived, an act which is necessary for the prosecution of one kind of business in the ordinary way may be wholly unnecessary for carrying on another. Consequently no answer of any value can be given to the abstract question—can one partner bind his firm by such and such an act? unless, having regard to what is usual in business, it can be predicated of the

(*g*) See *Hawtayne v. Bourne*, 7 M. & W. 595; and see *Ex parte Chippen- dale*, 4 De G. M. & G. 19. See, also, *Simpson's Claim*, 36 Ch. D. 532.

(*h*) See *Ricketts v. Bennett*, 4 C. B. 686, and *Dickinson v. Valpy*, 10 B. & C. 128.

¹ What would be proper in one line of business would not be proper or necessary in a different business, and the powers of partners vary accordingly. The authority of a partner depends upon the usage of the particular trade in which the firm is engaged, and the firm might or might not be bound according to the custom of the firm in its dealings, or of other firms in the same locality and same branch of business. *Mills v. Bunce*, 29 Mich. 364; *Shaw v. McGregory*, 105 Mass. 96; *Durant v. Rogers*, 87 Ill. 508; *Pierce v. Jarnagin*, 57 Miss. 107; *Smith v. Collins*, 115 Mass. 388.

act in question either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever. There are obviously very few acts of which any such assertions can be truly made. The great majority of acts, and practically all which give rise to doubt are those which are necessary in one business and not in another. Take, for example, negotiable instruments; it may be necessary for one member of a firm of bankers to draw, accept, or indorse a bill of exchange on behalf of the firm, and to require that each member should put his name to it would be ridiculous; but it by no means follows, nor is it in fact true, that there is any necessity for one of several solicitors to possess a similar power, for it is no part of the ordinary business of a solicitor to draw, accept, or indorse bills of exchange. The question, therefore, can one partner bind the firm by accepting bills in its name? admits of no general answer; the nature of the business and *the practice of those who carry it on (usage [*128] or custom of the trade) must be known before any answer can be given (*i*).

The question when the agency of a partner begins and ends will be examined hereafter, see bk. ii. c. 2, § 3.

SECTION II.—LIABILITIES OF PARTNERS IN RESPECT OF ACTS WHICH ARE NEITHER TORTS NOR FRAUDS.

Having noticed the general principles determining the extent to which one partner is the agent of the firm it is proposed to examine the power of one partner to bind his firm in particular cases where there is no question of tort or fraud. For the sake of convenience, subjects noticed will be arranged in alphabetical order.

Accounts.—An account rendered by one partner relative to a partnership transaction is equivalent to an account rendered by the firm (*k*).¹

(*i*) See *Hogarth v. Latham*, 3 Q. B. D. 643; *Taunton v. Royal Ins. Co.*, 2 Hem. & M. 135.

(*k*) *Fergusson v. Fyffe*, 8 Cl. & Fin. 121, where an account sent by one partner showing a balance due

¹ An account rendered by a partner is in its nature an admission, and the statement of an account by one partner binds the firm. *Cady v. Kyle*, 47 Mo. 346; *Burgan v. Lyell*, 2 Mich. 102; *Phillips v. Purinton*, 15 Me. 425; *Walden v. Sherburne*, 15 Johns. 409; *Munson v. Wickwire*, 21 Conn. 513.

The power of one partner to settle accounts, and to assent to a transfer of them, will be found noticed *infra* under the head *Debts*.

Admissions. — The admissions of one partner with reference to a partnership transaction are evidence against the firm (*l*): but are not necessarily conclusive (*m*).² An admis-

from the firm, and bearing interest at 9 per cent. was held to be binding on the firm. See as to false accounts, *infra*, § 3.

(*l*) *Wyd v. Braddick*, 1 Taunt. 104; *Pritchard v. Draper*, 1 R. & M. 191, affirmed 2 Cl. & Fin. 379; *Nicholls v. Dowding*, 1 Stark. 81; *Sangster v. Mazarredo*, ib. 162; *Thwaites v. Rich-*

ardson, 1 Peake, 23; *Grant v. Jackson*, ib. 268; *Wright v. Court*, 2 Car. & P. 232; and see the last preceding note, and *ante*, p. 87. As to part-owners, see *Jaggers v. Binnings*, 1 Stark. 64.

(*m*) *Wickham v. Wickham*, 2 K. & J. 491, where the point in question was the amount of a debt.

² Admissions must be within the scope of the business, to be competent. *Oakley v. Aspinwall*, 2 Sandf. 7; *Hahn v. St. Clair Savings & Co.*, 50 Ill. 456; *Heffron v. Hanaford*, 40 Mich. 305; *Boor v. Lowrey*, 103 Ind. 468; *McLeod v. Lee*, 17 Nev. 103; *McLeod v. Bullard*, 84 N. C. 515.

The difficulty often is to define what is the scope of the partnership business, and what acts and agreements are within it. *Loudon & Co. v. Hagerstown & Co. Bk.*, 36 Penn. St. 498; *Cadwallader v. Kroesen*, 22 Md. 200; *Jackson v. Todd*, 56 Ind. 406; *Shaw v. Gregory*, 105 Mass. 96; *Smith v. Collins*, 115 Mass. 388; *McCrary v. Slaughter*, 58 Ala. 230; *Pierce v. Jarnagin*, 57 Miss. 107; *Durant v. Rogers*, 87 Ill. 508; *Quinecy v. White*, 63 N. Y. 370; *Mills v. Bunce*, 29 Mich. 364.

Admissions of each partner may be received separately at the discretion of the presiding judge, until, by the admissions of all, all are shown to be partners. *Barcroft v. Haworth*, 29 Iowa, 462; *Welsh v. Speakman*, 8 Watts & S. 257; *Hilton v. McDowell*, 87 N. C. 364; *Lea v. Guice*, 13 Sm. & Mar. 21 Miss. 656; *Fogerty v. Jordan*, 2 Robt. (N. Y.) 319; *Jennings v. Estes*, 16 Me. 323; *Smith v. Collins*, 115 Mass. 388; *Mershon v. Hobensack*, 22 N. J. L. 372.

On a bill against three partners by one who claimed to be a partner and proved admissions by two to that effect, no relief could be granted against the two, excluding the third. *Carfrae v. Vanbuskirk*, 1 Ont. Ch. 539. See, also, *McFadyen v. Harrington*, 67 N. C. 29; *Lewis v. Allen*, 17 Ga. 300; *Alcott v. Strong*, 9 Cush. 323; *Currier v. Silloway*, 1 Allen, 19; *Nixon v. Downey*, 42 Iowa, 78; *Haughey v. Strickler*, 2 Watts & S. 411; *Heffron v. Hanaford*, 40 Mich. 305; *Edwards v. Tracy*, 62 Penn. St. 374; *Reed v. Kremer*, 111 id. 482; *Martin v. Kaffroth*, 16 S. & R. 120; *Lazarus v. Long*, 3 Ired. L. 39; *Rogers v. Suttle*, 19 Ill. App. 163; *Cowan v. Kinney*, 33 Ohio St. 422; *King v. Ham*, 4 Mo. 275; *Converse v. Shambaugh*, 4 Neb. 376; *Evans v. Corriell*, 1 G. Greene, 25; *Lea v. Guice*, 21 Miss. 656; *Johnston v. Warden*, 3 Watts, 101; *Degan v. Singer*, 41 Ill. 28; *Hahn v. St. Clair Savings & Co.*, 50 id. 456; *Gardner v. N. W. Mfg. Co.*, 52 id. 367.

Admissions to bind others received after proof of partnership. *Wiley v. Griswold*, 41 Iowa, 375; *Boyce v. Watson*, 3 J. J. Marsh, 498; *Phillips v. Purington*, 15 Me. 425; *Taylor v. Cook*, 11 Ont. P. R. 60; *Doremus v. McCormick*, 7 Gill, 49; *Cunningham v. Sublette*, 4 Mo. 224; *Odiorne v. Maxey*, 15 Mass. 39; *Smith v. Collins*, 115 id. 388; *Western Assurance Co. v. Towle*, 65 Wis. 247; *Munson v. Wickwire*, 21 Conn. 513; *Goodenough v. Duffield*, *Wright*, 455; *Hilton v. McDowell*, 87 N. C. 364; *McCann v. McDonald*, 7

sion by one person who afterwards enters into partnership with others is no evidence against them, merely because

Neb. 305; *Gulick v. Gulick*, 14 N. J. L. 578; *Faler v. Jordan*, 44 Miss. 283; *Talbot v. Wilkins*, 31 Ark. 411; *Lang v. Fiske*, 11 Me. 385; *Ruckman v. Decker*, 23 N. J. Eq. 283; *Drumright v. Philpot*, 16 Ga. 424; s. c. 60 Am. Dec. 738; *Wolle v. Brown*, 4 Whart. 365; *Jemison v. Minor*, 34 Ala. 33; *Hoboken Bk. v. Beckman*, 36 N. J. Eq. 83; s. c. 37 id. 331; *Adams v. Brownson*, 1 Tyler (Vt.) 452; *Allen v. Owens*, 2 Speers, 170 (S. C.); *Talbot v. Wilkins*, 31 Ark. 411; *Fogerty v. Jordan*, 2 Robt. 319 (N. Y.); *Hutchins v. Childress*, 4 Stew. & Port. 34; *Fickett v. Swift*, 41 Me. 65; *Foster v. Fifield*, 29 Me. 136; *Harryman v. Roberts*, 52 Md. 64, 77; *Sneed v. Kelly*, 3 Dana, 538 (Ky.).

Two firms having a common partner, notice to the one is notice to the other. *New York & Alabama Contracting Co. v. Selma Savings Bank*, 51 Ala. 305; *Hume v. Watt*, 5 Kan. 34.

An individual partner's admissions in answers in chancery and garnishee process can be used in actions at law against firm. *Anderson v. Wanzer*, 5 How. (Miss.) 587; *Lewis v. Allen*, 17 Ga. 300; *Hutchins v. Childress*, 4 Stew. & Port. 34; *Chapin v. Coleman*, 11 Pick. 330; *Dupierriess v. Hallisay*, 27 La. Ann. 132.

To avoid the binding effect upon his co-partners of the admissions of one partner in his examination in a suit against the firm, they must seek by an examination of some of themselves to contradict or qualify the statements of the partner whose evidence they object to. *Taylor v. Cook*, 11 Ont. P. R. 60.

Admissions of deceased partner. *McLellan v. Pennell*, 52 Me. 402; *Doremus v. McCormick*, 7 Gill, 49.

In a suit against surviving partners to recover the amount of a note given by the deceased partner in his single name, his declarations that the transactions for which the note was given were for the partnership business and that it was a company note, are not admissible in evidence, if there be no evidence *aliunde* that those transactions were for the partnership. Nor is evidence admissible in such suit that one of the surviving partners, after the death of the partner who signed the note, recognized the note as one which the firm were bound to pay, and attempted to borrow money to pay it and offered to take it up and give the note of the survivors in lieu of it, if it be not shown that this was known or consented to by the other survivor.

When in such suit there is no evidence that the surviving partners, before the death of the other partner, had knowledge of or gave consent to his giving notes in his own name alone for the debts of the firm, and there is evidence that he, when he gave such notes, charged the amount thereof against the firm as cash, and also evidence that the plaintiff knew of the partnership and made charges against the firm in other cases—the declarations of the deceased partner, when he borrowed the money for which the note was given, are not admissible in evidence against the survivors. *Ostrom v. Jacobs*, 9 Metc. 454. *But see* *Clock v. Beekman*, 18 Hun, 25 N. Y. S. C. 502.

Admissions of A. made *after the time had expired* for which C. had bound himself to B. for A.'s conduct as a partner were not received in an action against C. on his bond. *Hotchkiss v. Lyon*, 2 Blackf. 222.

Ditto as to admissions after dissolution or withdrawal. *Dortie v. Dugas*, 55 Ga. 484; *Craig v. Alverson*, 6 J. J. Marsh, 609; *Fick v. Mulholland*, 48 Wis. 310; *Crumless v. Sturgess*, 6 Heisk. 190; *Dowzelot v. Rawlings*, 58 Mo. 75.

Admission of one after he has sold out his interest in a firm will not be received to defeat an action in the firm name for a debt due the firm contracted prior to his sale of his interest. *Owings v. Low*, 5 Gill & J. 134.

they and he are partners when the evidence is sought to be used (*n*). Moreover, in an action against partners, the answer

(*n*) *Tunley v. Evans*, 2 Dowl. & L. 747; *Catt v. Howard*, 3 Stark. 3.

But if the admissions tended to show payment to the retiring partner, this would be received so far. *Lefavour v. Yandes*, 2 Blackf. 240; *Kirk v. Hiatt*, 2 Md. 322.

Admission by active partner after dissolution that debt has not been paid, binds the dormant partner. *Bridge v. Gray*, 14 Pick. 55.

Under act of 1838, authorizing action by one firm against another with a common partner, his acts and declarations after dissolution are admissible in evidence in such action. *Tassey v. Church*, 4 Watts & S. 141.

Judgment rendered on the admission of one partner after dissolution may be set aside by the other, especially if collusion be reasonably suspected. *Moore v. O'Leary*, 9 Low. Can. J. 164.

A., being in partnership with B., collected a sum of money in his individual capacity for C., and afterwards executed to the latter a note in the firm name for the amount. In a suit against the firm on the note, the plaintiff offered to prove that A., during the existence of the firm, had declared that said money had been used by himself and partner in the partnership business. Held inadmissible. *Hickman v. Reineking*, 6 Blackf. 387.

If a creditor of one of several partners take from his debtor a bill or note in the name of the firm for his debt, without the knowledge of the other partners, he cannot sue the firm on such bill or note. *Hickman v. Reineking*, 6 Blackf. 387.

A declaration by a partner, though made during the existence of a partnership, that a liability incurred by a third person, at his request, in the borrowing of a sum of money, was for the benefit of the firm, is not binding upon his co-partner.

Had a note been given in the partnership name, the rule would have been different. Then the *onus* would have lain on the co-partner to show that the note was given for the individual debt of the partner who gave it. *Thom v. Smith*, 21 Wend. 365.

Admissions and declarations of individual partners are competent against the one admitting and declaring—not in his favor as against his creditors, nor in favor of one whom he declares not to be his partner, against the latter's creditors. *Bond v. Nave*, 62 Md. 506; *Phillips v. Purington*, 15 Me. 425; *Young v. Smith*, 25 Mo. 341; *Dixon v. Barclay*, 22 Ala. 370; *Corps v. Robinson*, 2 Wash. C. C. 388; *Thomas v. Wolcott*, 4 McLean, 365; *Lewis v. Post*, 1 Ala. 65; *Champlen v. Tilley*, 3 Day, 303; *Bill v. Porter*, 9 Conn. 23; *Sullivan v. Murphy*, 23 Minn. 6; *Fleshman v. Collier*, 47 Ga. 253; *Stoddard v. McMahan*, 35 Tex. 267; *Carmichael v. Green*, 55 Ga. 116; *Wotherspoon v. Wotherspoon*, 49 N. Y. Supr. Ct. 152; *Ford v. Kennedy*, 64 Ga. 537; *Dobson v. Chambers*, 78 N. C. 334; *Gregory v. Martin*, 78 Ill. 38; *Cowan v. Kinney*, 33 Ohio St. 422; *King v. Barbour*, 70 Ind. 35; *Cottrell v. Vanduzen*, 22 Vt. 511; *Cleghorn v. Johnson*, 11 Iowa, 292; *Levy v. McDowell*, 45 Tex. 220; *Thurston v. Horton*, 16 Gray, 274; *Fenn v. Timpson*, 4 E. D. Smith, 276; *Lee v. McDonald*, 6 Ont. K. & Q. B. (old series) 130.

Nor in favor of the firm in an action against it. *Hutchins v. Childress*, 4 Stew. & Port. 34.

Nor between creditors, all such declarations and admissions being mere hearsay as to third persons. *Clinton Lumber Co. v. Mitchell*, 61 Iowa, 132. See *Porter v. Graves*, 104 U. S. 171, 26 L. ed. 691; *Collett v. Smith*, 143 Mass. 473; *Webster v. Stearns*, 44 N. H. 498; *Boor v. Lowrey*, 103 Ind. 468;

of one of * them to interrogatories cannot be read [*129] against the others (*o*), unless they have an opportunity of contradicting it.

See further, *infra*, under the heads *Debts* and *Representations*.

3. **Agents.**¹—As to the appointment of agents, see *infra* under the head *Servants*.

4. **Arbitration.**—One partner cannot, without special authority, bind the firm by a submission to arbitration (*p*). The power to refer disputes, even although they relate to dealings with the firm, cannot be said to be necessary for carrying on its business in the ordinary way (*q*).² Where a

(*o*) *Parker v. Morrell*, 2 Ph. 453; (*q*) *Stead v. Salt*, 3 Bing. 101;
Dale v. Hamilton, 5 Ha. 393. *Adams v. Bankhart*, 1 Cr. M. & R.

(*p*) See *Stead v. Salt*, 3 Bing. 101; 681; and see *Boyd v. Emerson*, 2 A.
Adams v. Bankhart, 1 Cr. M. & R. & E. 184.
681; *Antram v. Chace*, 15 East, 209.

Wiley v. Griswold, 41 Iowa, 375; *McCann v. McDonald*, 7 Neb. 305; *Munson v. Wickwire*, 21 Conn. 513.

Declarations or admissions that a person is a partner are evidence against him that he is a partner, and that there is a partnership. And statements and correspondence in business matters are competent to charge the speaker or writer as a partner. *Teller v. Patten*, 20 How. 125, 15 L. ed. 831, and editorial note; *Thompson v. Kalback*, 12 S. & R. 238; *McPherson v. Rathbone*, 7 Wend. 216; s. c. 11 Wend. 96; *Gowan v. Jackson*, 20 Johns. 176.

¹ One partner may appoint an agent by parol to make and indorse bills, etc.; or he may do it in writing *under seal*. *Lucas v. Bank of Darien*, 2 Stew. 280.

Where one partner gave a power of attorney to carry on or close up the business, and purchases were made after dissolution apparently under the power which had not been revoked, he was held liable for the purchases as debts of the firm. *Bryce v. Davidson*, 25 Ont. Q. B. 371.

Such a power given by one making a temporary removal is not revoked by his return unaccompanied by acts indicating revocation. *Ib*.

Partner may appoint agent to accept a composition in insolvency of debt due firm. *Raymond v. McMahon*, 4 All. 524 (N. B.).

One partner—except in a mining partnership—can employ an attorney to appear for the firm. *Wheatly v. Tuft*, 4 Kan. 240; *Charles v. Eshelman*, 5 Col. 107.

And generally the power of the single partner as agent on behalf of his co-partners extends to the appointment of all such suitable and proper agents as should be appointed in carrying on the ordinary business in an effective manner, and such agents are entitled to recover of the firm for the services, and if paid by the partner hiring them, he can have contribution from his co-partners. *Durgin v. Somers*, 117 Mass. 55; *Harvey v. McAdams*, 32 Mich. 472; *Beste v. His Creditors*, 15 La. Ann. 55; *Holloway v. Turner*, 61 Md. 217; *Tillier v. Whitehead*, 1 Dall. 269; *Frye v. Sanders*, 21 Kan. 26; s. c. 30 Am. Rep. 421; *Wills v. Cutler*, 61 N. H. 405.

² A partner cannot bind his co-partner by a submission of the interests of both to arbitration, but might bind himself so as to submit his own interests to such decision. *Karthaus v. Ferrer*, 1 Pet. 222, 7 L. ed. 121; *Hall v.*

partnership has been dissolved, and it has been agreed that one of the partners shall get in the debts due to the firm, he has no power after bringing an action in the name of the firm for a debt due to it, to bind his co-partner by a reference of all matters in difference between the plaintiffs and the defendant (*r*). The partner actually referring the dispute is, however, himself bound by the award (*s*): and the other partners may become bound by ratification (*t*).

[¹/₃. **Assignments.** — See *Sales*, *post*, p. *146.]

5. **Banking Account.** — One partner has no implied authority to bind the firm by opening a banking account on its behalf in his own name (*u*). See *infra*, *Cheques*.

6. **Bills of Exchange and Promissory Notes.**³ — Every member of an ordinary trading partnership has implied power to bind the firm by drawing, accepting, or indorsing bills of exchange, or by making and indorsing promissory notes in its name and for the purposes of the firm (*x*). And if two partners unknown to each other give two bills in [*130] the name of the firm in payment * of the same demand, the firm will be liable on both bills, if held by *bonâ fide* holders for value without notice of the mistake (*y*).

Acceptances in blank. — One partner, however, has no implied power to accept bills in blank, nor to bind his co-partners, otherwise than jointly with himself. A bill accepted in blank by one partner in the name of the firm is not binding

(*r*) *Hatton v. Royle*, 3 H. & N. 500.

(*s*) *Strangford v. Green*, 2 Mod. 228.

(*t*) As in *Thomas v. Atherton*, 10 Ch. D. 185.

(*u*) *The Alliance Bank Limited v. Kearsley*, L. R. 6 C. P. 433.

(*x*) See *Re Riches*, 4 D. G. J. & S. 581, and 5 N. R. 287; *Pinckney v.*

Hall, 1 Salk. 126; *Dickinson v. Valpy*, 10 B. & C. 128; *Sutton v. Gregory*, 2 Peake, 150; *Smith v. Baily*, 11 Mod. 401; *Lewis v. Reilly*, 1 Q. B. 349; *Stephens v. Reynolds*, 5 H. & N. 513. See, also, *The Bills of Ex. Act*, 1882, § 23, cl. 2.

(*y*) *Davison v. Robertson*, 3 Dow. 218.

Lanning, 91 U. S. 160, 23 L. ed. 271; *Armstrong v. Robinson*, 5 Gill & J. 412; *Martin v. Thrasher*, 40 Vt. 460; *Baby v. Davenport*, 3 Ont. Q. B. 54.

But where submission to arbitration need not be under seal it is held otherwise. *Gay v. Waltman*, 89 Penn. St. 453; *Hallack v. March*, 25 Ill. 45. And approval of an agreement to submit will be inferred from the dealings of the parties. *Mackay v. Bloodgood*, 9 Johns. 285; *Hamilton v. Phoenix Insurance Co.*, 106 Mass. 395; *Buchanan v. Curry*, 19 Johns. 137; *Davis v. Berger*, 54 Mich. 652.

³ See *BORROWING MONEY*, *post*, p. 131.

on it except in favour of a *bonâ fide* holder for value without notice of the way in which the bill was accepted (*z*).

Joint and several notes.—A joint and several promissory note signed by one partner for himself and co-partners, does not bind them severally (*a*); but it does bind them and him jointly (*b*) and himself separately (*c*).

Powers of attorney to draw bills, &c.—In consequence of the doctrine that every member of an ordinary trading partnership has authority to draw, accept, and indorse bills in its name, if a member of such a partnership goes abroad and gives his co-partner a power of attorney to manage his affairs, and draw, accept, or indorse bills in his name, this authority warrants the attorney in putting his principal's name to non-partnership bills only; his authority to put the partnership name to partnership bills being independent of, and unaffected by, the letter of attorney (*d*).

Bills, &c., of non-trading partnerships.—With respect to partnerships which are not trading partnerships, the question, whether one partner has any implied authority to bind his co-partners by putting the name of the firm to a negotiable instrument, depends upon the nature of the business of the partnership (*e*). In the absence of evidence showing necessity or usage, the power has been denied to one of several mining adventurers (*f*), quarry workers (*g*), *farmers (*h*), solicitors (*i*). Where two firms agreed [*131] to accept each other's drafts, and to share the profits arising from their sale, it was held that one of these firms was not liable to a person who had purchased a bill drawn on it by the other firm, but which the drawees had not accepted (*k*).

If, however, a member of a non-mercantile firm concurs in

(*z*) *Hogarth v. Latham*, L. R. 3 Q. B. D. 643.

(*a*) See *Perring v. Hone*, 4 Bing. 32; 2 Car. & P. 401.

(*b*) *MacLae v. Sutherland*, 3 E. & B. 1.

(*c*) See *Elliot v. Davis*, 2 Bos. & P. 338; *Gillow v. Lillie*, 1 Bing. N. C. 695.

(*d*) *Attwood v. Munnings*, 7 B. & C. 278.

(*e*) See *Dickinson v. Valpy*, 10 B. & C. 128.

(*f*) *Brown v. Byers*, 16 M. & W.

252; *Dickinson v. Valpy*, 10 B. & C. 128. Compare *Brown v. Kidger*, 3 H. & N. 853.

(*g*) *Thicknesse v. Bromilow*, 2 Cr. & J. 425.

(*h*) *Greenslade v. Dower*, 7 B. & C. 635.

(*i*) *Hedley v. Bainbridge*, 3 Q. B. 316; *Levy v. Pyne*, Car. & Marsh. 453; *Harman v. Johnson*, 2 E. & B. 61, and 3 Car. & Kir. 272.

(*k*) *Nicholson v. Ricketts*, 2 E. & E. 497.

drawing, or authorises his partner to draw, a bill in the name of the firm, he impliedly authorises its indorsement in the same name for the purpose for which it was drawn (*l*).

Authority to transfer bill.—It must be borne in mind that a person who has no authority to use the name of another, so as to render him liable on a bill or note, may nevertheless have sufficient authority to transfer the property therein (*m*).

Before leaving the subject of negotiable instruments, it may be observed that it is often difficult to say whether they purport to be the paper of a firm, or only that of some one or more of the partners. Unless the paper purports to be the paper of a firm, no one whose name is not on the paper is liable to be sued on it (*n*). This subject will be adverted to hereafter.

7. **Bonds.**—See *Borrowing money and Deeds*.

8. **Borrowing money.**—One of the most important of the implied powers of a partner is that of borrowing money on the credit of the firm.¹

(*l*) See *Garland v. Jacomb*, L. R. 8 Ex. 216; *Lewis v. Reilly*, 1 Q. B. 349.

Nevill, L. R. 5 C. P. 478, where, however, the property was held not to pass.

(*m*) See on this subject, *Smith v. Johnson*, 3 H. & N. 222; *Heilbut v.*

(*n*) Bills of Ex. Act, 1882, § 23.

¹ It is among the powers of a partner, if within the scope of the particular business, to borrow money in the name of the firm, and thus render his partners liable for the sum borrowed; and to bind the firm by an agreement to pay interest on the same at any lawful rate; and to sign the firm name to any writing admitting the fact of borrowing and promising to pay, and thereby to furnish evidence against the firm and each of its members. *Walsh v. Lennon*, 98 Ill. 27; s. c. 38 Am. Rep. 75; *Schmertz v. Shreeve*, 62 Penn. St. 457; s. c. 1 Am. Rep. 439; *Bloomley v. Grinton*, 9 Ont. Q. B. 455; *Union Bank v. Bulmer*, 2 Manitoba, 380; *McCord v. Field*, 27 Ont. C. P. 391; *Robertson v. Jones*, 20 N. B. 267.

And if one partner makes his own note and indorses it in the name of the firm and sells it to an innocent purchaser, and appropriates the proceeds to his own individual use, the firm is held. *Redlon v. Churchill*, 73 Me. 146; s. c. 40 Am. Rep. 345; *Sherwood v. Snow*, 46 Iowa, 485; s. c. 26 Am. Rep. 155; *Atlas National Bank v. Savery*, 127 Mass. 75; *Wait v. Thayer*, 118 Mass. 474; *Parker v. Burgess*, 5 R. I. 277; *Waldo Bank v. Lumbert*, 16 Me. 416; *Waldo Bank v. Greely*, 16 Me. 419; *Farrell v. Lovett*, 68 Me. 326; s. c. 28 Am. Rep. 59; *Kellogg v. Curtis*, 69 Me. 212; s. c. 31 Am. Rep. 273; *Hobart v. Penny*, 70 Me. 248; *Smith v. Livingston*, 111 Mass. 342; *Freeman's National Bank v. Savery*, 127 Mass. 79; s. c. 34 Am. Rep. 345; *Murray v. Lardner*, 2 Wall. 110; *Cromwell v. Sac Co.*, 96 U. S. 51; *New York Fire Ins. Co. v. Bennett*, 5 Conn. 574; s. c. 13 Am. Dec. 109; *Henderson v. Carveth*, 16 Ont. Q. B. 324; *McLeod v. Carman*, 1 Han. 592 (N. B.).

But one partner cannot bind the firm by a note in the firm name for his private debt in the absence of express authority, or necessity, or custom. One

General power to borrow.—The sudden exigencies of commerce render it absolutely necessary that such power should

who sues on such a note must show affirmatively the special authority or ratification. *Mechanics' and Traders' Insurance Co. v. Richardson*, 33 La. Ann. 1308; s. c. 39 Am. Rep. 280 (see note); *Levi v. Latham*, 15 Neb. 509; s. c. 48 Am. Rep. 361 (stable-keepers); *Deardorf v. Thatcher*, 78 Mo. 128; s. c. 47 Am. Rep. 95 (insurance agents); *Friend v. Duryee*, 17 Fla. 111; s. c. 35 Am. Rep. 89 (attorneys); *Pease v. Cole*, 53 Conn. 53; s. c. 55 Am. Rep. 53 (theatrical); *Priest v. Chouteau*, 85 Mo. 398; s. c. 55 Am. Rep. 373 (theatrical); *Smith v. Sloan*, 37 Wis. 285; s. c. 19 Am. Rep. 757 (attorneys); *Pooley v. Whitmore*, 10 Heisk. 629; s. c. 27 Am. Rep. 783 (publishers); *Judge v. Braswell*, 13 Bush. 69; s. c. 26 Am. Rep. 185 (mining); *Ulery v. Ginrich*, 57 Ill. 531 (farming); *Crosthwaite v. Ross*, 1 Humph. 23; s. c. 34 Am. Dec. 613 (medicine); *Coche v. Branch Bank of Mobile*, 3 Ala. 175 (tavern-keeper).

In *Deardorf v. Thatcher*, *supra*, the court use the words "consent and ratification" instead of "authority."

In the United States the *onus* to show authority or ratification is on the creditor seeking payment; in England it is on the partner sought to be held. *Dob v. Halsey*, 16 Johns. 34; see *Rogers v. Bachelder*, 12 Pet. 221 (Story, J.); *Stewart v. Parker*, 2 P. & B 223 (N. B.); *Royal Canadian Bank v. Wilson*, 24 Ont. C. P. 362; *Canadian Bank of Commerce v. Wilson*, 36 Ont. Q. B. 9; *Beals v. Sheldon*, 4 Ont. K. & Q. B. 302 (old series).

The authority of one partner to sign for the partnership is limited to matters within the scope of the business, and will not be extended to transactions out of the usual scope, nor to things done by the firm, but of unusual or rare occurrence. *Fraser v. McLeod*, 8 Ont. Chy. 268; *Union Bank v. Bulmer*, 2 Manitoba, 380; *Federal Bank v. Northwood*, 7 Ont. R. 389.

A partner's agency to sign for the partnership does not allow him to indorse another partner's name without his knowledge or assent on third parties' paper payable to that partner and owned by the partnership. Certainly not so as to make it proper to insert the words "or bearer" in the note without the consent of the makers. *McCauley v. Gordon*, 64 Ga. 221; s. c. 37 Am. Rep. 68.

One of two illiterate partners, unable after search to find his partner on the day of the maturity of a partnership note, and so have him join in renewing the same, gave his own note for a sum to cover the old note and an account for goods furnished to the firm by the holder. This note being unpaid, the maker was sued and a small portion realized by the sale of his goods on execution. Subsequently he brought a suit to wind up the partnership, and the holder of the note was allowed, on appeal, to recover the balance due out of the partnership assets. *Carruthers v. Ardagh*, 20 Ont. Ch. 579. See dissenting opinion of Blake V.-C. See also *Goldie v. Maxwell*, 1 Ont. Q. B. 424; and see *Annis v. Lowes*, 5 Ont. K. & Q. B. 198 (old series).

An acceptance *not in firm name*, but by one partner only, of a cheque drawn on the firm by one who had no available funds in the firm's hands, does not bind the firm. *Hovey v. Cassels*, 30 Ont. C. P. 230.

When the bill was drawn and accepted, the firm name was "J. S. W. & Co." It was accepted by one partner in the name of "W. M. & Co.," and J. S. W. & Co. were not bound. *Royal Canadian Bank v. Wilson*, 24 Ont. C. P. 362.

That the private debt of the partner for which he gave the firm note was for money, part of which was used for the partnership business, does not help the matter. *McCord v. Field*, 27 Ont. C. P. 391.

One partner purchased lands from debtor of firm in his own name and gave notes in the firm name to discharge incumbrances, without knowledge of his co-partner. It was alleged that this was done to more effectually secure a debt due the firm.

exist in the members of a trading partnership, and accordingly in a comparatively early case this power was clearly recognised (*o*). It has been already seen that one partner can bind the firm by a bill or note, upon which money [*132] may be obtained, by the *every-day process of discounting; and the power of one partner to pledge partnership goods for advances is equally well established (*p*). At the same time, the power of borrowing money, like every other implied power of a partner, only exists where it is necessary for the transaction of the partnership business in the ordinary way; and consequently if money is borrowed by one partner for the declared purpose of increasing the partnership capital (*q*), or of raising the whole or part of the capital agreed to be subscribed in order to start the firm (*r*), or if the business is such as is customarily carried on on ready money principles, *e.g.*, mining on the cost-book principle (*s*), or without borrowing, as in the case of solicitors (*t*), the firm will not be bound unless some actual authority or

(*o*) See *Lane v. Williams*, 2 Vern. 277, 292; *Rothwell v. Humphries*, 1 Esp. 406; *Denton v. Rodie*, 3 Camp. 493; *Lloyd v. Freshfield*, 2 Car. & P. 333; *Ex parte Bonbonus*, 8 Ves. 540; see, too, *De Ribeyre v. Barclay*, 23 Beav. 125; *Gordon v. Ellis*, 7 Man. & Gr. 607; *Brown v. Kidger*, 3 H. & N. 853.

(*p*) See *infra*, Mortgage and Pledge.

(*q*) *Fisher v. Taylor*, 2 Ha. 218.

(*r*) *Greenslade v. Dower*, 7 B. & C. 635.

(*s*) *Hawtayne v. Bourne*, 7 M. & W. 595; *Burmester v. Norris*, 6 Ex. 796; *Ricketts v. Bennett*, 4 C. B. 686.

(*t*) *Plumer v. Gregory*, 18 Eq. 624, as to the 1,700*l*.

Held, that the firm was not bound by the notes. *Fraser v. McLeod*, 8 Ont. Chy. 268.

H. made a note payable to L. or order. M., a partner of L., indorsed it in the name of the firm, but without L.'s sanction or knowledge. L. afterwards indorsed it "without recourse." Plaintiff took it with knowledge.

Held, that L. was not bound. *Harris v. McLeod*, 14 Ont. Q. B. 164.

The fact that money borrowed by one partner has been applied to partnership purposes is not sufficient of itself to render the firm liable at law to repay it, there being no actual or implied authority to borrow, and no ratification.

The test of liability is whether the partner had authority to borrow. *Robertson v. Jones*, 20 N. B. 267. See dissenting opinion of Weldon and Fisher, J.J.

Where plaintiff's money was received by one partner and by him handed to cashier of firm, who deposited it in bank to firm's credit, plaintiff was entitled to recover it of firm irrespective of private agreement of partners. *Ib*.

That a partner had for six months previously used firm cheques to pay his private debts, gave his creditor reasonable ground for believing that he had authority to make a promissory note in the firm name for his private debt, and so use it. *London Chartered Bank v. Kerr*, 4 Victorian L. R. (L.) 330.

ratification can be proved. Still less will the firm be bound where borrowing is prohibited and the person advancing the money is aware of the prohibition (*u*).

Overdrawing banking account.—Overdrawing a banking account is borrowing money (*x*).

Increasing capital.—Connected with the subject of borrowing money, is that of increasing capital. A sole trader who borrows money for the purpose of his trade, cannot with propriety be said to increase his capital; but if two or more persons are in partnership, and each borrows money on his own *separate* credit, and the money is then thrown into the common stock, the capital of the firm, as distinguished from the separate capitals of the persons composing it, may with propriety be said to be increased. But, in this case, the firm is not the borrower, nor is it debtor to the lender for the money borrowed. If a firm borrows money so as to be itself liable for it to the lender, the capital of the firm is no more increased than is the capital of an ordinary individual increased by his getting into debt. When, therefore, *it is said that one partner has no implied power to [*133] borrow on the credit of the firm for the purpose of increasing its capital, what is meant is, that one partner, as such, has no power to borrow, on the credit of himself and co-partners, money, which each was to obtain on his individual credit, and then to bring into the common stock (*y*). Unless the expression means this, it means nothing (*z*).

Difference between borrowing and obtaining goods, &c., on credit.—There is a practical difference between borrowing money and procuring works and materials on credit, which requires notice. The difference consists in this, that he who possesses power to borrow on the credit of another, has a much more extensive, and therefore more easily abused, trust reposed in him than one who is empowered only to pledge the credit of another for value received, when the pledge is

(*u*) Worcester Corn Exchange Co., 3 De G. M. & G. 180. See, also, the cases in the next note.

(*x*) Blackburn Building Soc. v. Cunliffe, Brookes & Co., 22 Ch. D. 61, and 9 App. Ca. 827; Waterlow v. Sharp, 8 Eq. 501; and *Re Cefn Cilcen Mining Co.*, 7 Eq. 88, *contra*, must be considered as overruled.

(*y*) See *Greenslade v. Dower*, 7 B. & C. 635; *Fisher v. Taylor*, 2 Ha. 218, as to the power of one partner to do this.

(*z*) See *Bryon v. Metropolitan Saloon Omnibus Co.*, 3 De G. & J. 123.

given. A power, therefore, to incur debt, which is necessarily incidental to almost every partnership, by no means involves a power to borrow money; and the cases which show that adventurers in cost-book mines are liable for supplies furnished to the mine (*a*), but not for money borrowed for the purposes of the mine (*b*), show that the difference here alluded to is judicially recognised.

The effect of having had the benefit of money improperly borrowed will be noticed hereafter. See *infra*, § 6.

See further as to borrowing money, *infra*, *Mortgages and Pledges*.

9. **Cheques**. — One partner has implied power to bind the firm by cheques, not post dated (*c*), drawn on the bankers of the firm in the partnership name (*d*); and if one partner directs the bankers of the firm not to pay a cheque of [*134] the firm, the *bankers incur no liability to the firm if they follow such directions (*e*).

10. **Contracts**. — One partner can bind his co-partners by varying a contract made with both in the ordinary course of business (*f*).

11. **Debts. Payment to one partner**. — If a debt is owing to a firm, payment by the debtor to any one partner extinguishes the claim of all, each partner being ostensibly the agent of all the rest to get in debts owing to the firm (*g*). After a dissolution, payment to any one of the partners discharges the debtor (*h*), even though a third person is appointed to collect the debts owing to the firm, and the creditor is aware of that fact (*i*). But if on a dissolution a

(*a*) *Tredwen v. Bourne*, 6 M. & W. 461; *Hawken v. Bourne*, 8 ib. 703.

(*b*) *Hawtayne v. Bourne*, 7 M. & W. 595; *Burmester v. Norris*, 6 Ex. 796; *Ricketts v. Bennett*, 4 C. B. 686; *Brown v. Byers*, 16 M. & W. 252. See, also, *Beldon v. Campbell*, 6 Ex. 886.

(*c*) See *Forster v. Mackreth*, L. R. 2 Ex. 163; *Bull v. O'Sullivan*, L. R. 6 Q. B. 209.

(*d*) *Laws v. Rand*, 3 C. B. N. S. 442; *Backhouse v. Charlton*, 8 Ch. D. 444. As to cheques drawn by directors, see *Re Gloucester, Aberystwith, &c., Rail. Co.*, 18 Jur. 815, L. J.

(*e*) Before the Jud. Acts, an action for dishonoring the cheque must have

been brought in the names of all the partners, and in the case supposed such an action could not have been sustained. See *infra*, book ii. c. 3. It is conceived that the statement in the text is correct, notwithstanding the modern rules as to parties.

(*f*) *Leiden v. Lawrence*, 2 N. R. 283, Ex.

(*g*) *Anon.*, 12 Mod. 446.

(*h*) *Duff v. The East India Co.*, 15 Ves. 198; *Brasier v. Hudson*, 9 Sim. 1. See *Phillips v. Phillips*, 3 Ha. 281, as to the receipts of a surviving partner.

(*i*) *Bristow v. Taylor*, 2 Stark. 50; *Porter v. Taylor*, 6 M. & S. 156; *King v. Smith*, 4 Car. & P. 108.

debt due to the partnership is assigned to one of the partners, and the debtor has notice of the assignment, he can only pay the assignee (*k*). If there are two firms with one common partner, and a bill of exchange is given to one firm and is indorsed by it to the other, payment to the first firm is an answer to an action brought on the bill by the second (*l*).

Payment to one partner of debt not due to firm. — Moreover, when it is said that payment to one partner is payment to all, it is supposed that the payment is made in discharge of a debt due to the firm. If it is due, not to the firm, but to one of the partners, the rule does not hold. Therefore, if an owner of goods sells them, the purchase-money must be paid to him or his agent; and payment to a person interested with him in the profits accruing from the sale will not do: for though the two may be liable as if they were partners by reason of their community of interest in the profits, it does not

* therefore follow that he who is to share the profits [*135] is entitled to receive the proceeds of the sale of the goods themselves which belong exclusively to the other (*m*). So, where a court orders payment to be made to one partner by name, the order must be strictly obeyed, and payment to the partner of the person named in the order will not suffice, though both are defendants in the action in which the order is made (*n*).

Receipts given by one partner. — As one partner can accept payment of a debt due to the firm, so he can effectually release (*o*) and give a valid receipt for such debt (*p*). It is, however, to be remembered that although one partner has implied authority to get in debts owing to the firm and to give discharges for them, still a receipt is not conclusive evidence of payment; so that if one partner gives a receipt in fraud of his co-partners, it will not preclude the firm from recovering the money (*q*). Nor will a release given by one

(*k*) See *Duff v. East India Co.*, 15 Ves. 213.

(*l*) See *Jacaud v. French*, 12 East, 317.

(*m*) See *Smith v. Watson*, 2 B. & C. 401.

(*n*) See *Showler v. Stoakes*, 2 Dowl. & L. 3. As to payments by the Paymaster-General to one of several

partners, see *Supreme Court Fund Rules*, 1886, r. 63.

(*o*) See *Hawkshaw v. Parkins*, 2 Swanst. 539, and *post*, Release.

(*p*) *Henderson v. Wild*, 2 Camp. 531.

(*q*) *Farrar v. Hutchinson*, 9 A. & E. 641; *Henderson v. Wild*, 2 Camp. 561.

partner bind the firm if the releasing partner acts in fraud of his co-partners and in collusion with the debtor (*r*).

Assent to creditors' deed.—If one of several partners assent to a deed executed by a debtor of the firm in favour of his creditors, the firm is bound by the deed (*s*); and the doctrine, that one partner has no implied authority to bind his co-partners by an instrument under seal, has no application to such a case (*t*).

Assent to transfer of debt.—One partner can bind the firm by assenting to a transfer of a debt due to it, as for example, to a transfer of the firm's account from their banker to his successor in business (*u*). So, where a creditor of [*136] the firm assigns the debt due to him, and *one of the partners recognises the transfer and promises to pay the transferee, the firm is bound by this promise (*x*).

Taking bill in payment.—Again, one partner may receive a bill in payment of a debt due to the firm, and so preclude the firm from suing for the debt so long as the bill is running (*y*).

Payment to an agent of a firm of a bill drawn in his own name and payable to his own order in respect of a debt due to the firm, is not payment to the firm unless he has authority to draw in that way, or the firm gets the money (*z*).

Settling debts.—Although each partner has power to receive payment of a partnership debt, and to give a discharge for it on payment, it does not follow that he has power to compromise or settle the debt in any way he likes without payment. As a general proposition, an authority to receive payment of a debt does not include an authority to settle it in some other way (*a*); and a partner has no implied authority to discharge a separate debt of his own by agreeing that it shall be set against a debt due to his firm (*b*).

(*r*) *Aspinwall v. The London & N. W. Rail. Co.*, 11 Ha. 325, and see *post*, Release.

(*s*) See *Morans v. Armstrong*, Arms. M'Art. & Ogle, Ir. N. P. Rep. 25; *Dudgeon v. O'Connell*, 12 Ir. Eq. 566.

(*t*) *Dudgeon v. O'Connell*, 12 Ir. Eq. 566.

(*u*) *Beale v. Caddick*, 2 H. & N. 326. See, also, *Backhouse v. Charlton*, 8 Ch. D. 444.

(*x*) *Lacy v. McNeile*, 4 Dow. & Ry. 7.

(*y*) See *Tomlins v. Lawrence*, 3 Moo. & P. 555.

(*z*) See *Hogarth v. Wherley*, L. R. 10 C. P. 630.

(*a*) See the last note, and *Pearson v. Scott*, 9 Ch. D. 198; *Young v. White*, 7 Beav. 506; *Underwood v. Nichols*, 17 C. B. 239; *Story on Agency*, § 98.

(*b*) *Piercy v. Fynney*, 12 Eq. 69.

Promise by one partner to pay a debt of the firm. — A promise by one partner to pay a debt owing by the firm, undoubtedly binds the firm (*e*). How far a promise by one partner will prevent the statute of limitations from running in favour of the others will be seen hereafter (*d*).

Tender. — If a debt is owing to a firm, tender to one partner is tender to all; and if a debt is owing by a firm, tender by one partner is tender by all (*e*); and if, after tender by a firm, the creditor demands the sum tendered, a refusal to pay made by the partner on whom the demand is made, is a refusal by the firm (*f*).

12. Deeds. — One partner has no implied authority to bind *his co-partners by deed (*g*):¹ but a release [*137] of a debt or demand stands on a peculiar ground, and will bind the firm though executed by one partner only (*h*). A deed executed by one partner in the name and in the presence of his co-partners, is deemed an execution by them (*i*); and if one partner executes a warrant of attorney in the partnership name, with the consent of his co-partner, the Court will not set it aside on the ground that the latter did not execute it (*k*).

A joint and several bond executed by one partner in the name of himself and co-partners, binds him separately, although it is invalid against them (*l*); and it has been held that a deed purporting to be made by all the partners of a

See, also, *Kendal v. Wood*, L. R. 6 Ex. 243. Compare *Wallace v. Kellsall*, 7 M. & W. 264.

(*c*) *Anon. v. Layfield*, Holt, 434; *Lacy v. McNeile*, 4 Dow. & Ry. 7.

(*d*) A promise to one enures for the benefit of all. *White v. Williams*, Willm. Woll. & Hod. 52.

(*e*) *Douglas v. Patrick*, 3 T. R. 683.

(*f*) *Peirse v. Bowles*, 1 Stark, 323.

(*g*) *Harrison v. Jackson*, 7 T. R. 207; *Steiglitz v. Eggington*, Holt, 141. As to presuming an authority given by deed, see Holt, 141.

(*h*) See *Hawkshaw v. Parkins*, 2 Swanst. 539, and as to creditors' deeds, *Dudgeon v. O'Connell*, 12 Ir.

Eq. 566. See in cases of fraud, *ante*, p. 135, note (*r*), and *infra*, Release.

(*i*) *Ball v. Dunsterville*, 4 T. R. 313; *Burn v. Burn*, 3 Ves. 578. See as to ratifying a deed executed by one person for another, *Tupper v. Foulkes*, C. B. N. S. 797. In *Orr v. Chase*, 1 Mer. 729, a bond executed by one partner in the name and on behalf of the firm, was held to be the bond of the firm; and see *Palmer v. Justice Assurance Soc.*, 6 E. & B. 1015.

(*k*) *Brutton v. Burton*, 1 Chitty, 707.

(*l*) *Elliott v. Davis*, 2 Bos. & P. 338.

¹ *Gerard v. Basse*, 1 Dall. 119. See instructive note and collection of cases upon subject of right of partner to bind the firm by specialty in 20 U. S., L. ed. 797; *Gibson v. Warden*, 81 U. S. 244. See *ante*, p. 124, note 1.

firm, and to assign all their property to trustees for creditors, is operative against a partner who executes it, although his co-partners ultimately decline to execute it also (*m*).

13. **Distress.** — If several partners grant a lease, any one of them may distrain, or appoint a bailiff to distrain, in the name of all; and a distress by one partner, or by the bailiff appointed by him, will be lawful, although the other partners are no parties to the distress, and do not assent thereto (*n*).

14. **Extension of business.** — It follows from the principles investigated at the commencement of the present chapter, that one partner has no implied power to bind the firm with respect to matters not falling within the scope of the business which it ostensibly carries on, or was formed to carry on (*o*).¹

[*138] * 15. **Guarantees and indemnities.** — How far one partner can bind the firm by a guarantee, obliging the firm to pay, if some other person does not, has been much disputed. The later cases, however, decide that unless it can be shown that the giving of guarantees is necessary for carrying on the business of the firm in the ordinary way, one of the members will be held to have no implied authority to bind the firm by them; for, generally speaking, it is not usual for persons in business to make themselves answerable for the conduct of other people. The subject was much considered in *Brettel v. Williams* (*p*). There the defendants, who were railway contractors, made a sub-contract for the performance of part of some work they had undertaken. The sub-contractor required a quantity of coal, and one of the defendants in the name of the firm, guaranteed to the plaintiffs, who were coal merchants, payment for coals to be supplied

(*m*) *Bowker v. Burdekin*, 11 M. & W. 128; *Cumberledge v. Lawson*, 1 C. B. N. S. 709; and compare *Latch v. Wedlake*, 11 A. & E. 959, and *Lascaridi v. Gurney*, 9 Jur. N. S. 302, C. P.

(*n*) See *Robinson v. Hofman*, 4 Bing. 562, and the cases there cited.

(*o*) *Ante*, pp. 124 *et seq.*

(*p*) 4 Ex. 623. See, also, *Hasleham v. Young*, 5 Q. B. 833; *Crawford v. Stirling*, 4 Esp. 207; *Duncan v. Lowndes*, 3 Camp. 478. The dictum of Lord Mansfield in *Hope v. Cust*, 1 East, 53, and the decision of Lord Eldon in *Ex parte Gardom*, 15 Ves. 286, are opposed to these authorities, but cannot be relied on after the decision in *Brettel v. Williams*.

¹ And a promise by all the partners in their individual names does not create firm liability. *Forsyth v. Woods*, 11 Wall. 484, 20 L. ed. 207.

by them to the sub-contractors. It was held that this guarantee did not bind the partners of the contractor signing it.

In *Sandilands v. Marsh* (*q*) a firm was held bound by a guarantee given by one of the partners, but in that case there was evidence of adoption and ratification by the firm of the contract of which the guarantee was part. In *Ex parte Harding* (*r*), the guarantee was several as well as joint, and therefore bound those who signed it. These cases cannot therefore be considered as opposed to those in which it has been held that one partner has no implied power to bind the firm by guarantees in its name.

Statute of frauds. — With respect to the statute of frauds, a guarantee signed by one partner in the name of the firm, is sufficient to bind all the partners, if authority from them can be proved (*s*).

But no partner is liable for a false and fraudulent representation as to the solvency of another person unless such representation is in writing, and signed by himself (*t*).

* If one partner, in consideration that a person [*139] will accept a partnership bill, promises that the firm will put him in funds to meet the bill when due, this promise binds the firm (*u*). But this is not guaranteeing payment of the debt of another within the rule above discussed.

16. **Insurances.** — One partner can bind the firm by an insurance of the partnership goods (*v*). And if one insures for all, he may give notice of an abandonment for all (*x*).¹

(*q*) 2 B. & A. 673.

(*u*) *Johnson v. Peck*, 3 Stark. 66.

(*r*) 12 Ch. D. 557.

(*v*) *Hooper v. Lusby*, 4 Camp. 66.

(*s*) See *Duncan v. Lowndes*, 3 Camp. 478.

See *Armitage v. Winterbottom*, 1 Man. & Gr. 130.

(*t*) 9 Geo. 4, c. 14, § 6. *Swift v. Jewsbury*, L. R. 9 Q. B. 301; reversing *Swift v. Winterbotham*, L. R. 8 Q. B. 244.

(*x*) *Hunt v. The Royal Exchange Assurance Co.*, 5 M. & S. 47.

¹ Insurance can be effected in the name of a nominal partnership, where the business is carried on by, and for the use of, one of the partners (*Phoenix Insurance Co. v. Hamilton*, 14 Wall. 504, 20 L. ed. 729), and by the general partner of a limited partnership (*Clement v. British American Assurance Co.*, 141 Mass. 298; and generally, *Graves v. Boston Marine Insurance Co.*, 2 Cranch, 419, 2 L. ed. 324).

As to the right of a partner to settle a loss, see *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479.

Where one partner is indebted to his co-partner, the creditor has an insurable interest in the life of the debtor. *Connecticut Mutual Life Insurance Co. v. Luchs*, 108 U. S. 498, 27 L. ed. 800.

17. **Interest.**—An admission by one partner that a debt of the firm bears interest at a given rate is *primâ facie* binding on the firm (*y*).

See further *ante*, under the head *Debts*.

18. **Judicial proceedings.**¹—The power of one partner to act for the firm in legal proceedings will be noticed hereafter, when treating of actions (Bk. II. c. 3, § 1), and bankruptcy (Bk. IV. c. 2).

19. **Leases.**²—One partner, as such, has no authority to contract on behalf of the firm for a lease of a house for partnership purposes (*z*).

Where a lease is made by several partners jointly, a notice to quit given by one on behalf of all is sufficient (*a*).

20. **Mortgages and pledges.**—(*a*) **By partners.**—A legal mortgage cannot be made of partnership real estate without the concurrence of all the partners (*b*).

It being, however, decided that a member of an ordinary trading partnership has power to borrow money on the credit of the firm, it follows almost necessarily that he should

have power to pledge partnership property as a security for advances. *The writer is not aware of any decision in which an equitable mortgage made by one partner by a deposit of deeds relating to partnership real estate, has been upheld, or the contrary; he can there-

(*y*) See *Fergusson v. Fyfe*, 8 Cl. & Fin. 121.

(*z*) *Sharp v. Milligan*, 22 Beav. 606, where, however, specific performance was decreed against the firm, the contract having been ratified by the other partners.

(*a*) *Doe v. Hulme*, 2 Man. & Ry. 433; *Doe v. Summersett*, 1 B. & Ad.

135; *Goodtitle v. Woodward*, 3 B. & A. 689. See *Right v. Cuthell*, 5 East, 491.

(*b*) See *ante*, heading *Deed*. In *Juggeewundas Keeka Shah v. Ramdas Brijbooken Das*, 2 Moo. In. Ap. 487, a mortgage by one partner was under peculiar circumstances held to bind the firm.

¹ Though a partner may employ an attorney to represent the firm in judicial proceedings (*Bennett v. Stickney*, 17 Vt. 531; *Wheatley v. Tutt*, 4 Kan. 249; *Phelps v. Brewer*, 9 Cush. 390), he cannot bind his partner individually thereby (*Phelps v. Brewer*, *supra*); and one partner has no power to confess judgment against his co-partners or the firm. *Hall v. Launing*, 91 U. S. 160, 23 L. ed. 261; *Atchison Savings Bank v. Templar*, 26 Fed. Rep. 581; *Christy v. Sherman*, 10 Iowa, 535; *Rhodes v. Amsink*, 38 Md. 345; *Richardson v. Fuller*, 2 Ore. 179; *Hoskinson v. Elliot*, 62 Penn. St. 393.

² A sealed lease, made in the name of the firm by one partner, though for a term requiring no seal, does not pass the estates of the other partners, unless authorized or ratified (*Dillon v. Brown*, 11 Gray, 179); and an entry under a lease made by one partner for the firm is a ratification. *Holbrook v. Chamberlain*, 116 Mass. 157; *Penn v. Kearney*, 21 La. Ann. 21.

fore only venture to submit, that such a mortgage ought to be held valid in all cases in which it is made by a partner having an implied power to borrow on the credit of the firm (*e*).

Pledges of chattels. — The implied authority of a partner who has power to borrow, to pledge the personal property of the firm for money borrowed, is beyond dispute (*d*); and the power is not confined to cases in which there is a general partnership; for, if several join in a purchase of goods to be sold for their common profit, a pledge of those goods by one of the persons interested is binding on them all (*e*). The implied power to pledge, moreover, extends to pledges for antecedent debts (*f*).

Redemption. — Any partner may, on behalf of the firm, redeem a pledge of the firm; but he alone is not the proper person to bring an action to recover the thing pledged (*g*).

Factors' acts. — A question of some importance arises as to the effect, if any, of the Factors' acts (*h*) on the power of one partner to sell and *pledge the goods [*141] of the firm. The writer is not aware of any authority upon this subject, but he conceives that those acts neither extend nor abridge the power in question. The Factors' acts do not apparently render valid any sale or pledge by one partner of partnership goods, which is not valid, independently of the acts, upon the principles of the common law.

(*c*) In *Re Clough*, 31 Ch. D. 324, an equitable mortgage by a surviving partner for a partnership debt was held valid. See, further, *Ex parte National Bank*, 14 Eq. 507; *Patent File Co.*, 6 Ch. 83; *Ex parte Lloyd*, 1 Mont. & Ayr. 494. Compare 7 T. R. 210, *per* Lord Kenyon.

(*d*) See *Ex parte Bonbonus*, 8 Ves. 549; *Butchart v. Dresser*, 10 Ha. 453, and 4 De G. M. & G. 542; *Brownrigg v. Rae*, 5 Ex. 489; *Gordon v. Ellis*, 7 Man. & Gr. 607. See, also, *Langmead's trusts*, 20 Beav. 20, and 7 De G. Mac. & G. 353, and as to ships, *Ex parte Howden*, 2 M. D. & D. 574.

(*e*) *Reid v. Hollinshead*, 4 B. & C. 867; *Re Gellar*, 1 Rose, 297; *Raba v. Ryland*, Gow N. P. 133; *Tupper v. Haythorne*, *ib.* 135; but see *Barton*

v. Williams, 5 B. & A. 395, p. 405, *per* Best, J., and note that there the goods pledged were not partnership property when the pledge was made. In *Ex parte Copeland*, 2 Mont. & Ayr. 177, it was questioned whether a pledge by one partner was valid if the pledgee had notice that the pledgor was not the only owner, but this it is conceived could only be material where the pledge is not made for ostensible partnership purposes.

(*f*) *Patent File Co.*, 6 Ch. 83; *Re Clough*, 31 Ch. D. 324; and see *Story on Partn.* § 101.

(*g*) See *Harper v. Godsell*, L. R. 5 Q. B. 422.

(*h*) 4 Geo. 4, c. 83; 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39; 40 & 41 Vict. c. 39. See, upon them, *Navulshaw v.*

(*h*) **To partners.**—One partner has implied authority to accept, in the ordinary course of business, security for a debt due to his firm; and where one member of a firm of bankers accepted as security for money due to the bank, shares in a company, and caused them to be registered in the name of the bank, it was held that he had implied authority so to do, although the consequence was that he thereby rendered himself and his co-partners liable as contributories of the company (*i*).

21. **Notice.**—Questions frequently arise as to whether notice to one partner is notice to all.

General rule.—As a general rule, notice to a principal is notice to all his agents (*k*); and notice to an agent of matters connected with his agency is notice to his principal (*l*). Consequently, as a general rule, notice to one partner of any matter relating to the business of the firm is notice to all the other members (*m*); and if two firms have a common partner, notice which is imputable to one of the firms is imputable to the other also, if it relates to the business of that other (*n*).

[*142] * **Firm affected by its agent's knowledge.**—In conformity with these principles, if a firm claims the benefit of a transaction entered into by one of its members, it cannot effectually set up its own ignorance of what that member knew, so as to be in a better position than he himself would have been in had he been dealing on his own account as a principal (*o*).

Collinson v. Lister.—Thus in *Collinson v. Lister* (*p*), it was

Brownrigg, 2 De G. M. & G. 441; *Kaltenbach v. Lewis*, 10 App. Ca. 617.

(*i*) *Weikersheim's case*, 8 Ch. 831.

(*k*) See *Mayhew v. Eames*, 1 Car. & P. 550, and 3 B. & C. 601; *Willis v. The Bank of England*, 4 A. & E. 21.

(*l*) *Dresser v. Norwood*, 17 C. B. N. S. 466, reversing the decision below, 14 C. B. N. S. 574. *Per Ashhurst, J.*, *Fitzherbert v. Mather*, 1 T. R. 16; *Le Neve v. Le Neve*, 1 Ves. S. 64; *Collinson v. Lister*, 7 De G. M. & G. 634, and 20 Beav. 356. See, generally, on this maxim, *Blackburn, Low & Co. v. Vigors*, 17 Q. B. D. 553. Whether a principal is affected by notice acquired by the agent, but not

in that character, is perhaps scarcely yet settled. *Dresser v. Norwood* is a strong authority that in commercial transactions he is.

(*m*) *Alderson v. Pope*, 1 Camp. 404; *Porthouse v. Parker*, ib. 82; *Big-nold v. Waterhouse*, 1 M. & S. 259; and see *Salomons v. Nissen*, 2 T. R. 647.

(*n*) See *Steele v. Stuart*, 2 Eq. 84; *Porthouse v. Parker*, 1 Camp. 82; *Worcester Corn Exch. Co.*, 3 De G. M. & G. 180; *Jacaud v. French*, 12 East, 317; *Powles v. Page*, 3 C. B. 16.

(*o*) See *ante*, p. 116, and the cases below.

(*p*) 7 De G. M. & G. 634, and 20 Beav. 356.

held that a banking company was not entitled to the benefit of a mortgage given to it by its own manager, in his character of an executor. For the mortgage was given as a security for money borrowed by the manager as executor, and advanced by himself as manager for improper purposes, and in breach of the trusts which, as executor, he had to perform; and the company, in taking the mortgage, knew that their manager was giving a security on his testator's estate for money previously taken by him from the funds of the company, and which monies he had been requested to replace, or give security for. Under these circumstances it was treated as clear that the bank could stand in no better position than the manager would have done had he advanced the money himself and taken a mortgage for it from himself.

Meaning of phrase, notice to one is notice to all. — When it is said that notice to one partner is notice to all, what is meant is (1.), that a firm cannot, in its character of principal, set up the ignorance of some of its members against the knowledge of others of whose acts it claims the benefit, or by whose acts it is bound; and (2.) that when it is necessary to prove that a firm had notice, all that need be done is to show that notice was given to one of its members as the agent and on behalf of the firm. The expression means no more than this; and although every person has notice of what he himself does, it would be absurd to hold that a firm has notice of everything done by each of its members. Where one member is acting beyond his powers, or is committing a fraud on his co-partners, or is the person whose duty it is to give his firm notice of what he himself has done, in all such cases notice on his part is not equivalent to notice by them (*q*).

* **Bignold v. Waterhouse.** — In **Bignold v. Water-** [*143]
house (*r*) one of a firm of carriers entered into an agreement to carry valuable parcels free of charge, but under such circumstances as to render the agreement not binding on the other partners. A parcel known to the partner who made the agreement to be of value, was sent, but was not entered or paid for as a valuable parcel. The other partners were held to be unaffected with the notice which

(*q*) See the judgment of Jessel, M. R., in *Williamson v. Barbour*, 9 Ch. D. 535 *et seq.*

(*r*) 1 M. & S. 255.

their co-partner had of the nature of the parcel, and were held not to be liable for its loss.

Breaches of trust.—So, if one partner is a trustee, and he improperly employs the trust funds in the partnership business, his knowledge that he is so doing is not imputable to the firm; and therefore, to affect the other partners with a breach of trust, further evidence must be adduced (*s*).

Notice to clerks.—Moreover, in cases of this kind, notice on the part of the clerks of the firm of what the fraudulent partner is doing is no more than notice to him: it is not sufficient to affect his co-partners (*t*).

Ratification.—These cases show what indeed is obvious of itself, viz., that if a partner exceeds his authority, and it is contended that the firm is bound by what he has done, on the ground that it has ratified his acts, evidence must be given to prove that at the time of the alleged ratification his co-partners knew of those acts. It would be absurd if, in such a case, knowledge by him was equivalent to knowledge by them (*u*).

A retired partner is not affected with notice on the part of the continuing partners of what has occurred since the partnership, if the agency subsisting between them has been dissolved (*x*). Nor is an incoming partner affected with notice of what occurred before he joined the firm (*y*).

22. **Payments.**—See *ante*, under the head *Debts*.

23. **Penalties.**—One partner may bind the firm [*144] under a *penalty to observe a contract which he is authorised to enter into on its behalf (*z*).

24. **Purchases.**—It has long been decided that every member of an ordinary trading partnership has implied power to purchase on the credit of the firm such goods as are or may be necessary for carrying on its business in the usual way (*a*). This cannot be more strongly exemplified than by the case of *Bond v. Gibson* (*b*).

Bond v. Gibson.—There two persons carried on business as harness makers; one of them bought on the credit of the

(*s*) See *Ex parte Heaton*, Buck. 386.

(*t*) See *Lacey v. Hill*, 4 Ch. D. 537, and *Williamson v. Barbour*, 9 Ch. D. 536.

(*u*) See acc. the last note.

(*x*) *Adams v. Bingley*, 1 M. & W. 192.

(*y*) See *per* Jessel, M. R., in *Williamson v. Barbour*, 9 Ch. D. 536.

(*z*) *Beckham v. Drake*, 9 M. & W. 79.

(*a*) *Hyatt v. Hare*, Comb. 383.

(*b*) 1 Camp. 185.

firm a number of bits to be made up into bridles; but instead of using the bits for the partnership business he pawned them for his own use. The seller of the bits was nevertheless held entitled to recover their price in an action against both partners.

Goods supplied to one partner. — The firm is liable although the goods may have been supplied to one only of the partners, and no other person may have been known to the supplier as belonging to the firm (*c*). But, as will be seen hereafter, the firm is not liable for goods ordered by and supplied to one partner, and which it was his duty to contribute to the joint stock of the firm (*d*).

Non-trading partnerships. — The power of one partner to bind the firm by a purchase of goods on its credit is not confined to trading partnerships. Thus where some printers and publishers agreed to share the profits of a work, and the publishers ordered paper for that particular work and became bankrupt, the printers were held liable for its price to the stationers who supplied it (*e*). It is of no consequence what the partnership business may be, if the goods supplied are necessary for its transaction in the ordinary way.

Return of goods. — If goods are sold to a firm on credit and are delivered to the firm, and then one partner returns them, the firm not being able to pay for them, the property will be vested in the vendor; *subject, in the event [*145] of bankruptcy, to the question of fraudulent preference (*f*).

.25. **Receipts.** See *ante*, under the head *Debts*.

26. **Releases and covenants not to sue.** — A covenant by one partner not to sue for a partnership debt does not amount to a release of that debt by the firm (*g*); although a covenant by all the partners not to sue would be equivalent to a release (*h*), and a release by one partner operates as a release by the firm (*i*).

(*c*) Ruppell *v.* Roberts, 4 Nev. & Man. 31; City of London Gas Co. *v.* Nicholls, 2 Car. & P. 365; Gardiner *v.* Childs, 8 ib. 345.

(*d*) See book ii. ch. 2, § 3. Green-slade *v.* Dower, 7 B. & C. 635, and cases of that class.

(*e*) Gardiner *v.* Childs, 8 Car. & P.

345; compare Wilson *v.* Whitehead, 10 M. & W. 503.

(*f*) De Tastet *v.* Carroll, 1 Stark. 88.

(*g*) Walmsley *v.* Cooper, 11 A. & E. 216.

(*h*) Deux *v.* Jefferies, Cro. El. 352.

(*i*) 2 Ro. Ab. Release, 410 D.; Harkshaw *v.* Parkins, 2 Swanst. 539.

Setting aside bona fide releases by one partner.—This last proposition, viz., that a release by one partner is in point of law a release by all, is strongly illustrated by those cases in which attempts have been unsuccessfully made by one partner to set aside a release given by a co-partner without his consent.

In *Furnival v. Weston* (*k*) the members of a firm sued the defendant for a libel on the firm published by him. One of the partners, without the consent of the other, released the defendant, and there being no fraud in the case the Court refused to set the release aside. In *Arton v. Booth* (*l*), the two plaintiffs Arton and Dawson had been partners, but they had dissolved partnership, and it was agreed between them that Arton should get in the debts of the firm, and that Dawson should not interfere with him. The defendant was sued for a debt owing to the plaintiffs, and after action brought Dawson released him on receiving payment. Although the release deprived the plaintiffs of their costs, the Court would not interfere, as no case of fraud was made out. So in *Phillips v. Clagett* (*m*), where partners brought an action against the defendant for illegally pledging their property, the Court gave him leave to plead a release previously given by one of the partners.

Setting aside fraudulent releases.—However, if it can be shown that one partner has in fraud of his co-partners and in collusion with the defendant executed a release for the purpose of preventing them from enforcing a just demand, the defendant will not be allowed to plead this release as a [*146] defence to an action against him. Thus in *Barker v. Richardson* (*n*), the plaintiffs Barker and Owen

had been partners, but they had dissolved partnership, and it was agreed that Barker should get in the debts owing to the firm, and if necessary sue for the same. The defendant was indebted to the firm and had notice of the above agreement. He was also a creditor of Owen on a private account, and Owen, against Barker's consent, gave a receipt for the partnership debt, and after the commencement of the action by

(*k*) 7 Moore, 356.

(*l*) 4 Moore, 192. See, too, *Jones v. Herbert*, 7 Taunt. 421, and compare *Barker v. Richardson*, 1 Y. & J. 362, stated lower down.

(*m*) 11 M. & W. 84.

(*n*) 1 Y. & J. 362. See, too, *Aspinall v. The London and N. W. Rail. Co.*, 11 Ha. 325; *Phillips v. Clagett*, 11 M. & W. 84.

Barker for the recovery of that debt, gave the defendant a formal release. The evidence showed that the release was given to defeat the action, to prevent Barker from recovering the debt due to the firm, and as part of a scheme for discharging Owen's private debt to the defendant. Under these circumstances the release was not allowed to be pleaded.

27. Representations and statements. — The firm is bound by all representations made by a partner whilst acting within the scope of his real or implied authority, and having reference to the business of the firm (*o*); but not by statements made by him as to his authority to do that which the nature of the business of the firm does not impliedly warrant (*p*).

The liability of partnerships for false and fraudulent representations will be discussed in the next section of this chapter.

See further on this subject *ante*, under the head *Admissions*.

28. Sales [and assignments]. — Any partner can dispose of any of the partnership goods (*q*); and in one case it was even held that he could make a valid sale of the partnership books (*r*).¹

(*o*) Rapp v. Latham, 2 B. & A.
795; Blair v. Bromley, 2 Ph. 354;
Wickham v. Wickham, 2 K. & J.
478.

(*p*) *Ex parte* Agace, 2 Cox, 312.
(*q*) Lambert's case, Godb. 244.
(*r*) Dore v. Wilkinson, 2 Stark.
287.

¹ The authority of a partner to sell any of the partnership assets does not extend to making assignments of the whole partnership property, as that is not fairly included within the scope of the business. Where, however, one partner absconds, the other may make a general assignment of property of the insolvent partnership for the benefit of creditors. *Sullivan v. Smith*, 15 Neb. 476; s. c. 48 Am. Rep. 354.

But not so if one partner dissents, or if no assent can be implied. See note 48 Am. Rep. 359.

To the same effect see *Loeb v. Pierpont*, 58 Iowa, 469; s. c. 43 Am. Rep. 122, which decides that a general assignment for the benefit of the partnership creditors made by one partner without express authority of the other partners, and without showing that such other partners are absent or incapable of expressing assent or dissent, is void, not merely voidable.

That one partner may sell the entire stock of the firm to pay its debts in good faith, though not the managing partner, see *Schneider v. Sanson*, 62 Texas, 201; s. c. 50 Am. Rep. 521. The sale was on Sunday, and the property was resold in block the same day. *Graser v. Stellwagen*, 25 N. Y. 315; *Williams v. Barnett*, 10 Kan. 455; *Halstead v. Shepard*, 23 Ala. 558; *Cayton v. Hardy*, 27 Mo. 536; *Arnold v. Brown*, 24 Pick. 89; *Lamb v. Durant*, 12 Mass. 54.

The plaintiff was allowed by his bill to establish a letter written by one

If by any event the partners become mere tenants in common of the partnership goods and one assumes to sell them, the purchaser, although he may only become tenant in common with the other partners, will nevertheless, if he gets possession of the goods, be able to retain them as against his co-tenants; for no action lies by one tenant in common against another for the recovery of the goods belonging to both (*s*).

[*147] *The question whether a partner's power to sell is in any way affected by the Factors' Acts has already been noticed (*t*).

29. **Servants.**—One partner has implied authority to hire servants to perform the business of the partnership (*u*); and the writer presumes that one partner has also implied authority to discharge them although he cannot do so against the will of his co-partners (*x*).

30. **Ships.**—Where necessary, one partner may bind the firm by chartering a ship on its behalf, and one partner may mortgage a ship belonging to the firm (*y*).

SECTION III.—LIABILITY OF PARTNERS IN RESPECT OF TORTS AND FRAUDS.

Liability of principals for the torts and frauds of their agents.
—If it were necessary, in order that one person should be

(*s*) Litt. § 323; *Fox v. Hanbury*, Cowp. 445; and see *Buckley v. Barber*, 6 Ex. 182; *ante*, p. 61.

(*t*) *Ante*, p. 140.

(*u*) *Beckham v. Drake*, 9 M. & W. 79. A servant of the firm is a servant of each of the partners, and may be described accordingly in an indictment for stealing the separate property of one of the partners. *R. v. Leech*, 3 Stark. 70.

(*x*) *Donaldson v. Williams*, 1 Cr. & M. 345. But see *Dixon* on Part. 139, *contra*.

(*y*) See as to chartering, *Thomas v. Clarke*, 2 Stark. 451, and as to mortgaging, *Ex parte Howden*, 2 M. D. & D. 574. The circumstance that a person is registered as a part-owner, does not, *per se*, render him liable for the acts of the other owners. *Myers v. Willis*, 17 C. B. 77, and 18 ib. 886; *Brodie v. Howard*, 17 C. B. 109.

partner as an equitable assignment of the proceeds of 34,000 wethers to the amount of £3,800, it being clear that one partner can bind his co-partners by a mortgage of personal property given to secure a partnership debt. *Williamson v. Cunningham*, 3 W., W. & A., B. Eq. 188, Victoria.

Surviving partner may make an assignment in payment of a debt of the firm. *Loeschigk v. Hatfield*, 51 N. Y. 660. But not a general assignment with preferences. *Salsbury v. Ellison*, 7 Colo. 167; s. c. 49 Am. Rep. 347.

liable for the tort or fraud of another, that the former should have authorised the commission of such tort or fraud, it would be a comparatively easy matter to determine in any particular case whether a tort or fraud committed by an agent could or could not be imputed to his principal. But as a principal is bound, not only by the authorised acts of his agent, but also by such unauthorised acts as fall within the scope of the authority apparently conferred upon him, the question whether a tort or fraud committed by an agent is or is not imputable to his principal becomes one of considerable difficulty; for it is obvious that it does not follow from the circumstance that such tort or fraud was not authorised, that therefore the principal is not legally responsible for it (*z*).

*** General principles.** — In order that responsibility [*148] may attach to the principal, in respect of a tort or fraud, it is necessary —

1. That he shall have authorised it in the first instance; or,
2. That it shall have been done on his behalf and he shall have ratified it (*a*); or
3. That it shall have been committed for his benefit by the agent in the course and as part of his employment (*b*).

That this last is sufficient is obvious from those cases in which masters have been held liable for the negligence of their servants (*c*); litigants for irregularities committed by their solicitors in the course of the litigation to conduct which they are retained (*d*); merchants for frauds committed by their factors and brokers whilst acting on their behalf (*e*); and shopkeepers for the illegal acts of their shopmen whilst in the shop and attending to its business (*f*).

Exceptions to the rule respondeat superior. — On the other hand, a principal is not liable for the torts and frauds of his agent, except upon one or other of the three above-mentioned grounds. Thus, a principal is not liable for the will-

(*z*) Pollock on Torts, 63 *et seq.*; Story on Agency, § 452; Paley on Agency, 294 *et seq.*

(*a*) Ratification can only be of an act done for the person ratifying, *Wilson v. Tumman*, 6 Man. & Gr. 236.

(*b*) As to the meaning of this expression, see *Burns v. Poulson*, L. R.

8 C. P. 563; Pollock on Torts, 72 *et seq.*

(*c*) See the last case, and *Patten v. Rea*, 2 C. B. N. S. 606.

(*d*) *Collet v. Foster*, 2 H. & N. 356.

(*e*) *Hern v. Nichols*, 1 Salk. 289.

(*f*) *Grammar v. Nixon*, 1 Str. 653; *Amory v. Delamirie*, ib. 505.

ful acts of his agent, if not done in the course of his employment and as part of his business (*g*); and this is true not only of assaults, batteries, libels, and the like, but also of frauds. The maxim *respondet superior* does not render a principal liable for the frauds of his agent, if the agent has been dealt with as a principal (*h*), nor unless the frauds have been committed by the agent for the benefit of his principal, and in the course and as part of his own employment (*i*).

Further, a principal is not bound by a contract [*149] which is a *fraud on him, and is known to be so by the person entering into the contract (*k*).

Having made these preliminary observations, it is proposed, in the present section, to examine the liability of partners for torts and frauds, as distinguished from contracts.

First as regards torts.

Torts of partners. — It follows from the principles of agency, coupled with the doctrine that each partner is the agent of the firm, for the purpose of carrying on its business in the usual way, that an ordinary partnership is liable in damages for the negligence of any one of its members in conducting the business of the partnership.¹ It has accord-

(*g*) *McManus v. Crickett*, 1 East, 106; *Croft v. Alison*, 4 B. & A. 590; *A.-G. v. Siddon*, 1 Cr. & J. 220. Compare *Limpus v. Lon. Gen. Omn. Co.*, 1 H. & C. 526.

(*h*) *Ex parte Eyre*, 1 Ph. 227.

(*i*) *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 ib. 104.

(*k*) *British and American Tel. Co. v. Albion Bank*, L. R. 7 Ex. 119; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43, and see, as to the effect of having benefited by such a contract, ib. p. 55.

¹ Express malice of one newspaper owner binds all. *Lothrop v. Adams*, 133 Mass. 471; s. c. 43 Am. Rep. 528. And see *Perret v. New Orleans Times Newspaper*, 25 La. Ann. 170; *Story v. Wallace*, 60 Ill. 51; *Reed v. Home Savings Bank*, 130 Mass. 443; s. c. 39 Am. Rep. 468. *Contra*, *Woodling v. Knickerbocker*, 31 Minn. 268.

Partners are liable in civil actions, upon the principle of agency, for the fraudulent or malicious conduct of one of their number, done without the knowledge of the others, for the benefit of the partnership, and within the scope of its business. *Locke v. Stearns*, 1 Met. 560; *White v. Sawyer*, 16 Gray, 586; *Wolf v. Mills*, 56 Ill. 360; *Durant v. Rogers*, 87 id. 508; *Chester v. Dickerson*, 54 N. Y. 1; *Guillon v. Peterson*, 89 Penn. St. 163; *Lothrop v. Adams*, *supra*; *Robinson v. Goings*, 63 Miss. 500; *Vanderburg v. Basset*, 4 Minn. 242; *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248.

Where A. furnished a team and equipments and took care of them, and B.

ingly been held that a firm of coach proprietors is answerable for the negligent driving of a partnership coach by one of the firm, the coach being driven for the firm in the ordinary course of business (*l*); and that two partners are liable for not keeping the shaft of a mine in proper order, although one of them only actually superintended it (*m*). So, a partnership is liable for the negligence of its servants acting in the course of their employment by the firm (*n*).

Breach of revenue laws.—If one partner, in conducting the business of the firm, is guilty of a breach of the revenue laws, all the partners are jointly and severally answerable for the consequent penalties, although they may not themselves have authorised or been parties to the illegal conduct of their co-partner (*o*).¹

Wilful torts.—As a rule, however, the wilful tort of one partner is not imputable to the firm. For example, if one partner maliciously prosecutes a person for stealing partnership property, the firm * is not answerable, [*150] unless all the members are, in fact, privy to the malicious prosecution (*p*). But a wilful tort committed by a partner in the course and for the purpose of transacting the business of the firm may make the firm responsible (*q*).

(*l*) *Moreton v. Hardern*, 4 B. & C. 223; and see as to ships, *Steel v. Lester*, 3 C. P. D. 121.

(*m*) *Mellors v. Shaw*, 1 B. & Sm. 437; *Ashworth v. Stanwix*, 7 Jur. N. S. 467, and 3 E. & E. 701. See as to irregular executions of writs by one of two partners, *Duke of Brunswick v. Slowman*, 8 C. B. 317.

(*n*) *Stables v. Eley*, 1 Car. & P. 614.

(*o*) *R. v. Stranyforth*, Bunb. 97;

A.-G. v. Burges, ib. 223; *A.-G. v. Weeks*, ib.; *R. v. Manning*, Comyn, 616. See, also, *Mullins v. Collins*, L. R. 9 Q. B. 292; *A.-G. v. Siddon*, 1 Cr. & J. 220. Compare *Newman v. Jones*, 17 Q. B. D. 132.

(*p*) *Arbuckle v. Taylor*, 3 Dow. 160.

(*q*) See *Limpus v. Lon. Gen. Om. Co.*, 1 H. & C. 526; *Pollock on Torts*, 80 *et seq.*

drove the team and solicited passengers and collected fares which the two divided, there was a partnership as to third persons, and A. was held liable for the negligence of B. *Stroher v. Elting*, 97 N. Y. 102, 49 Am. Rep. 515. And see *Champion v. Bostwick*, 18 Wend. 175; *Linton v. Hurley*, 14 Gray, 191.

In a partnership of physicians all are liable for the professional negligence of one. *Hyrne v. Erwin*, 23 S. C. 226; s. c. 55 Am. Rep. 15; *Whittaker v. Collins*, 34 Minn. 299.

The liability in actions of tort is joint and several. *Howe v. Shaw*, 56 Me. 291; *Whittaker v. Collins*, *supra*; *Roberts v. Johnson*, 58 N. Y. 613; *Wood v. Luscomb*, 23 Wis. 287.

¹ *Stockwell v. United States*, 13 Wall. 531, 20 L. ed. 491.

Secondly as regards frauds.

Frauds of partners. — An ordinary firm is liable for frauds committed by one of its members whilst acting for the firm, and in transacting its business;¹ and the innocent partners cannot divest themselves of responsibility on the ground that they never authorised the commission of the fraud. On the other hand, the firm is not liable for the other frauds of its members, unless it has in fact sanctioned such frauds, or the transactions of which they form part. It will be convenient to examine this subject first with reference to misapplications of money, and secondly, with reference to false representations by partners.

Liability of partnerships for misapplication of money by their members.

In order that a firm may be liable for the misapplication of money by one of its members, some obligation on the part of the firm to take care of the money must be shown. A receipt of the money by the firm *primâ facie* imposes this obligation; but where there is no receipt by the firm, there is *primâ facie* no obligation on its part with respect to the money in question. It becomes important, therefore, to determine accurately when money is to be considered as received by the firm. Upon this point the following observations suggest themselves.

1. The firm must be treated as receiving what any partner receives as its real or ostensible agent, *i.e.*, in the course of transacting the business of the firm.

2. In a case of this sort it is immaterial whether the other partners know anything about the money or not; for *ex hypothesi*, it is in the custody of one who must be regarded as their agent (*r*).

(*r*) See *infra*, rules 1, 2, 3.

¹ Partners are liable for the frauds and deceit of members of the firm, as well as for negligence. Fraudulent misrepresentations by a partner to the injury of innocent persons dealing with him as the representative of the firm, and without notice of any limitation upon his general authority as agent for the partnership, bind his partners; especially where the fraudulent acts enure to the benefit of the firm. *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248; *Castle v. Bullard*, 23 How. 172, 16 L. ed. 424. See also *Chester v. Dickerson*, 54 N. Y. 1; s. c. 13 Am. Rep. 550; *Tenney v. Foote*, 95 Ill. 101; *Thwing v. Clifford*, 136 Mass. 482; *Griswold v. Haven*, 25 N. Y. 595; *Manufacturers' & Mechanics' Bank v. Gore*, 15 Mass. 81; *Gray v. Cropper*, 1 Allen, 339.

3. The firm cannot be treated as receiving what one partner receives otherwise than as its real or ostensible agent, unless *the money actually comes into the possession or under the control of the other partners (s).

4. Agency being excluded in such a case as the last, the money cannot be considered as in the possession or under the control of the innocent partners, unless they know that it is so, or unless they are culpably ignorant of the fact (t).

These principles will be found to reconcile most, if not all, of the numerous decisions upon the important subject now under consideration, and to warrant the following rules deduced from them.

1. **Liability of firm for money received by one partner in the course of business.**—*Where one partner, acting within the scope of his authority, as evidenced by the business of the firm, obtains money and misapplies it, the firm is answerable for it.*¹

In *Willet v. Chambers* (u) two persons carried on business as solicitors and conveyancers, in partnership. One of them received money from a client to invest on mortgage, and misapplied it. The other partner was held liable to repay it to the client. Lord Mansfield relied upon the fact that the bill for the fictitious mortgage was made out in the name of the firm, and was paid to the innocent partner. The transaction therefore was clearly a partnership transaction, and the defendant, although perfectly innocent of the fraud himself, was liable for the consequences.

(s) See rules 3 and 4.

(t) Compare rule 2 with rules 3, 4, and 5, and see *infra*, p. 161; and as to culpable ignorance, compare *Marsh v. Keating*, 2 Cl. & Fin. 289; *Sims v. Brutton*, 5 Ex. 802; *Ex parte Geaves*, 8 De G. M. & G. 291; *Cleather v. Twisden*, 28 Ch. D. 340.

(u) Cowp. 814. See, also, *Atkinson v. Mackreth*, 2 Eq. 570; *St. Aubyn v. Smart*, 5 Eq. 183, and 3 Ch. 746; *Dundonald v. Masterman*, 7 Eq. 515. Compare *Cleather v. Twisden*, 28 Ch. D. 340; *Viney v. Chaplin*, 2 De G. & J. 483, and *Bourdillon v. Roche*, 27 L. J. Ch. 681, and *Harman*

v. Johnson, 2 E. & B. 61; *Plumer v. Gregory*, 18 Eq. 621, noticed *infra*. These cases show that whilst it is the ordinary business of a solicitor to receive money from a client for investment on a specific security, it is not part of his ordinary business to receive money for investment generally, nor to keep negotiable securities for his clients, nor, without express authority from them, to receive money for them on the payment off of a mortgage, or on a sale. See, also, *Re Bellamy & Met. Bd. of Works*, 24 Ch. D. 387.

¹ See *Hammond v. Heward*, 11 Ont. C. P. 261; *Smith v. Harvie*, 31 Ill. 62; *Re Ketchum*, 1 Fed. Rep. 815.

In *Brydges v. Branfill* (*x*), one of several solicitors connived at a fraud committed by a client of the firm in [*152] obtaining money *out of the Court of Chancery.

The money was received by the one partner under a power of attorney, and was handed over to the client. The other partners were entirely innocent, and were, in fact, ignorant of the transaction. It was nevertheless held that they were jointly and severally liable to make good the money to those to whom it really belonged (*y*).

In these cases the receipt of the money by one of the partners was the receipt by the firm; and the firm was liable, although in fact the other partners never received the money or knew of its receipt (*z*).

2. **Liability of firm for money in its custody in the course of business.** — *Where a firm in the course of its business (a) receives money belonging to other people, and one of the partners misapplies that money whilst it is in the custody of the firm, the firm must make it good.*¹

In *Devaynes v. Noble*, Clayton's case (*b*), some exchequer bills, deposited by their owner with a firm of bankers, were sold by one of the partners without the owner's knowledge; the money produced by the sale was applied by the firm to its own use; and it was held to be clear that the money having been received by the partnership, the amount became a partnership debt whether all the individual partners were or were not privy to the sale.

In *Devaynes v. Noble*, Baring's case (*c*), the firm was held liable for stock of its customers standing in the name of one of the partners of the firm, and wrongfully sold out by him. For the stock was standing in his name alone, in accordance with

(*x*) 12 Sim. 369. See, too, *Todd v. Studholme*, 3 K. & J. 324.

(*y*) Although solicitors who are partners are responsible for the acts of each other, the court will not exercise its summary jurisdiction against a solicitor to whom personally no blame is attributable. See *Re Lawrence*, 2 Sm. & G. 367; *Ex parte Gould*, 2 Mon. & A. 48; *Dixon v. Wilkinson*, 4 Drew. 614, and 4 De G. & J. 508; and *Re Ford*, 8 Dowl.

684. But where a firm of solicitors are the solicitors on the record, see *Norton v. Cooper*, 3 Sm. & G. 375.

(*z*) See *St. Aubyn v. Smart*, *ubi sup.*

(*a*) See *infra*, prop. 3 and 5, as to the importance of this qualification.

(*b*) 1 Mer. 575.

(*c*) 1 Mer. 611; see, too, *Warde's case*, *ib.* 624, and *Vulliamy v. Noble*, 3 Mer. 593.

¹ See *Emerson v. Durand*, 64 Wis. 111; s. c. 54 Am. Rep. 593; *Stanley v. Stark*, 115 Mass. 259.

the ordinary practice of the firm; the produce of the sale of the stock had been received by the firm, and had thus become a partnership debt; and the firm, in the accounts rendered by * it to its customer, had falsely represented [*153] the stock as still standing in the name of the partner who had sold it, and had given credit for the dividends as if the stock had still been there.

In *Ex parte Biddulph* (*d*), trust money in the hands of a firm of bankers, was drawn out and misapplied by one of the firm, and it was held that all the partners were liable to make it good.

In *Sadler v. Lee* (*e*), the members of a banking firm were authorised jointly and severally to sell out stock standing in the name of a customer, and one of the partners exercised the power and sold out the stock, and the firm was credited with the proceeds of the sale. These were afterwards misapplied by one of the partners, and it was held that the firm was answerable for the money.

Another well-known case illustrating the same principle is *Blair v. Bromley* (*f*). There two persons were in partnership as solicitors. A client entrusted one of them with money to invest on mortgage, and was told by him that it had been invested; whereas, in truth, the partner who had received the money had misapplied it. For many years the client was regularly paid interest by the solicitor who attended to the matter, and the fraud was not discovered until he became bankrupt. The other partner, who knew nothing whatever of the fraud, was nevertheless held liable to make good the money. It had been placed to the partnership account at the bankers' of the firm; the representation that it had been duly invested was within the scope of the duty of one partner with reference to the transaction in question; and it was held that the innocent partner could not divest himself of his liability by showing that he had no control over the account at the bankers', and did not in fact attend to the monetary transactions of the firm.

In *De Ribeyre v. Bayclay* (*g*), the defendants were in

(*d*) 3 De G. & Sm. 587.

(*e*) 6 Beav. 324.

(*f*) 5 Ha. 542, and 2 Ph. 354. See, also, *Eager v. Barnes*, 31 Beav. 579, a somewhat similar case.

(*g*) 23 Beav. 107; compare this case with *Ex parte Eyre*, 1 Ph. 227; *Bishop v. The Countess of Jersey*, 2 Drew. 143; *Coomer v. Bromley*, 5 De G. & Sm. 532, noticed *infra*, p. 159.

[*154] * partnership as stockbrokers, and were in the habit of receiving monies from the friends and connections of the firm, and of the individual partners for the purposes of investment. They also seem to have been in the habit of keeping for their customers the securities on which the investments were made. The plaintiff had some Portuguese bonds held by one of the partners for the plaintiff as a customer of the firm. The plaintiff married, and these bonds were assigned to trustees of whom that partner was one. The bonds remained in his custody as before, and were in fact deposited (and, as it seemed, with other securities belonging to other customers) with the bankers of the firm. The bonds were afterwards converted by the same partner into other bonds, which were deposited as the first had been. He acted in this matter as a stockbroker, in conformity with the usual course of business of the firm, and advised the plaintiff from time to time in the name of the firm of what had been done. The bonds were afterwards misapplied by him. It was held that they were originally clearly in the custody of the firm, and not in the custody of one only of its members, simply as trustee. It was further held that the assignment of the bonds did not take them out of the custody of the firm, and that the firm was therefore liable for the loss consequent on their unauthorised removal.

In the same case the firm was held liable for the loss of other bonds and securities bought by them for the plaintiff, and left in their custody in the usual way, and for money borrowed in the name of the firm, but from which the firm derived no benefit; and the fact that the plaintiff dealt only with one partner was held immaterial, the business transacted being the ordinary and regular business of the firm, and appearing as such in its books and accounts.

Principle of foregoing cases.—The principle of these cases is that the firm has in the ordinary course of its business obtained possession of the property of other people, and has then parted with it without their authority. Under such circumstances the firm is responsible: and the fact that the property has been improperly procured and placed in the custody of the firm by one of the partners, does not lessen the liability of the firm; for whether the firm is or is not liable for the original fraud by which the property

*got into its hands, it is responsible for the subse- [*155]
quent misapplication thereof by one of its members.

Fauntleroy forgery cases.—This was decided in the cases arising out of the notorious Fauntleroy forgeries (*h*). Fauntleroy, who was a partner in the banking house of Marsh & Co., forged powers of attorney for the sale of stock belonging to the customers of the bank. Marsh & Co. had an account with Martin Stone & Co., and the broker who sold out the stock under the forged powers of attorney remitted the proceeds of the sale to the credit of Marsh & Co., with Martin Stone & Co. Fauntleroy then drew out these monies by a cheque signed by him in the name of his firm, and applied them to his own use. The firm of Marsh & Co. was, however, held liable for them, although none of the partners except Fauntleroy had any hand in his forgeries or frauds, or in fact knew anything of what had taken place. The liability of the firm was based upon the ground that to sell stock for its customers and to receive the proceeds of the sale fell within the scope of its business; that the sale took place and the money was received in the usual way; that the fraud of Fauntleroy in the subsequent appropriation of the money afforded no defence after the money had once been in the custody of the firm: and that if the other partners knew nothing of the receipt of the money, they might have known it, and would have ascertained the source from which it had been derived, if they had used ordinary diligence, and had not placed such implicit confidence in their co-partner (*i*).

3. **Liability of firm for money received, but not in ordinary course of business.**—*If a partner in the course of some transaction unconnected with the business of the firm, or not within the scope of such *business, obtains money* [*156]

(*h*) *Stone v. Marsh*, 6 B. & C. 551, and Ry. & Moo. 364; *Keating v. Marsh*, 1 M. & A. 582; *Marsh v. Keating*, 1 Bing. N. C. 198, and 2 Cl. & Fin. 250; *Ex parte Bolland*, Mont. & McAr. 315, and 1 M. & A. 570; *Hume v. Bolland*, Ry. & Moo. 371, and 1 Cr. & M. 130. This last case is hardly consistent with *Stone v. Marsh*, *Marsh v. Keating*, or *Ex parte Bolland*.

Bolland, Fauntleroy's partners did know that the stock was sold by their broker, but did not know that the powers of attorney were forged. In *Marsh v. Keating*, they do not seem to have known anything either of the sale of the stock or of the receipt of the proceeds of the sale. Compare as to the receipt of the money by the firm the cases cited in the next four pages.

(*i*) In *Stone v. Marsh* and *Ex parte*

and then misapplies it, the firm is not without more (j) liable to make good the loss (k).¹

In *Harman v. Johnson* (l), one of several solicitors was entrusted with money for the purpose of investing it on mortgage when a good opportunity offered. He misapplied it, and it was held that his co-partner was not liable, inasmuch as there was no evidence to show that it was part of the business either of the firm in question or of solicitors generally to act as scriveners, *i.e.*, as depositaries of money waiting for investment. The Court intimated that if it had been shown that the money was given to the defaulting solicitor for the purpose of being invested on some specified mortgage, his co-partner would have been liable for its misapplication.

In *Plumer v. Gregory* (m), one of a firm of solicitor borrowed money without the knowledge of his co-partners from a client, saying that the firm wanted to lend it to another client on mortgage. The other partners were held not liable for this money, although two of them had borrowed money from the same client before.

In *Cleather v. Twisden* (n), bonds payable to bearer were placed for safe custody by trustees in the hands of one of a firm of solicitors and he misappropriated them. The other partners were held not liable; it being no part of their business to accept such securities for safe custody; and they not, in fact, knowing that their partner had them. The decision would have been the other way if it had been proved that the innocent partners had in fact known that the bonds were in the custody of their co-partner as representing the firm. Had such knowledge been proved, they would have been held to have had the bonds in their own custody, and would have been liable for them (o).

The case of *Sims v. Brutton* (p) must be referred [*157] to this head *if its authority is to be upheld. There the defendants Brutton and Clipperton were in part-

(j) As to the effect of knowledge on the part of the other partners, see *Cleather v. Twisden*, 28 Ch. D. 340, noticed *infra*, and prop. 5, *infra*.

(k) See, also, prop. 4, *infra*.

(l) 2 E. & B. 61.

(m) *Plumer v. Gregory*, 18 Eq. 621, as to the 1700*l*. Compare this

and the last case with *Willet v. Chambers*, and other cases cited *ante*, p. 151, note (u).

(n) 28 Ch. D. 340.

(o) See *infra*, prop. 5, p. 160.

(p) 5 Ex. 802. See, also, *Coomer v. Bromley*, 5 De G. & Sm. 532, noticed *infra*, p. 159.

¹ See *Toof v. Duncan*, 48 Miss. 48; *Adams v. Sturges*, 55 Ill. 468.

nership as solicitors. Brutton received 500*l.* from a client to invest on a mortgage, and the money was duly invested. The mortgage deed remained with the defendants, and the money secured by it was ultimately repaid to Clipperton, who then gave up the deed to the mortgagor. Shortly after this Clipperton re-lent 300*l.*, part of the 500*l.*, and again received back the mortgage deed as a security, and ultimately this 300*l.* was repaid to him and the mortgage deed was again delivered up to the mortgagor. Clipperton had no authority to receive payment of the 500*l.* from the mortgagor, nor to re-lend the 300*l.*, nor to receive repayment of it, and he acted throughout the whole of these transactions without the knowledge of his co-partner, or of the mortgagee the client of the firm. The books of the firm, however, showed the receipt of the 500*l.* in the first instance; its loan and repayment; and also the loan and repayment of the 300*l.* The client was, moreover, credited from first to last with the receipt of interest on the whole 500*l.*, and was debited with the same interest, which was in fact regularly paid to his agent. Clipperton misapplied the whole 500*l.*, and the Court held that Brutton, his partner, was not liable to make it good. The defendants, it was said, discharged their duty by laying out the money as directed, and they had no authority to receive it back. Therefore the repayment to Clipperton, though treated by him as a partnership transaction, was not so in point of law, and did not create any partnership responsibility. The entries in the books were only evidence of knowledge on the part of Brutton, and the case stated for the opinion of the Court expressly found that he had no knowledge of the facts.

Upon this case it is to be observed, that if, as appears to have been the case, the 500*l.* when paid off was placed to the credit of the firm with its bankers, the decision is difficult to reconcile with *Stone v. Marsh* and *Marsh v. Keating* (q).

4. Liability of firm for frauds of partner acting on his own account. — *A fraud committed by a partner whilst acting on his own separate account is not imputable to the firm, although had he not *been connected with the firm he [*158] might not have been in a position to commit the fraud.*

(q) The Statute of Limitations afforded a good defence to the action in *Sims v. Brutton*. The propriety

of the decision in that respect is untouched by the observations in the text.

This is little more than another mode of stating prop. 3; and the cases just alluded to may also be referred to under this head. In addition to them the following deserve notice.

In *Ex parte Eyre (r)*, the customer of a firm of bankers deposited with them a box containing securities belonging to himself, and he authorised one of the firm to take out some of the securities, replacing others, however, in their place. The partner so authorised, after obtaining the securities he was authorised to take and substituting others, clandestinely withdrew these last, and applied them to his own use. It was held that the firm was not liable for this act, and was not bound to make good the consequent loss; for it did not appear that the firm had any authority to open the box or to examine its contents, and the abstraction of the securities was a tortious act committed by one partner, who had been specially authorised to open the box, and who took out the securities, not for the partnership, nor for any partnership object, but in his separate character and for his own individual and separate purposes.

In *Bishop v. The Countess of Jersey (s)*, one of a firm of bankers advised the plaintiff, a customer of the bank, to sell out some stock, telling her that there was an opportunity to place out 5000*l.* on a good security at 5*l.* per cent to be given by his son. She accordingly authorised the sale, and the money produced was placed to her credit at the bank. She then drew a cheque for 5000*l.* which she gave to the partner with whom she had been in communication. No security was ever given; the money was lost; the partner in question absconded. Interest, however, on the 5000*l.* was for some time placed to the credit of the plaintiff in her account with the bank, but by whom did not appear. The other partners knew nothing of what had taken place until after the fraud had been committed, and it was held that they were not answerable. The transactions had nothing to do with the business of the partnership, and if they had not taken place at the bank there would have been no [*159] pretence for saying that the one *partner was acting otherwise than in a separate affair of his own.

A more difficult case, but one turning mainly on the same principle, is to be met with in *Coomer v. Bromley (t)*.

(r) 1 Ph. 227, affirming s. c. 2
M. D. & D. 66.

(s) 2 Drew. 143.

(t) 5 De G. & Sm. 532. See, too,

There the defendants, William and Joseph Bromley, were solicitors. The plaintiffs were their clients, and were trustees of some Navy 5*l.* per cent. annuities, in which they were themselves beneficially interested for their lives. William Bromley was associated by the plaintiffs with them as trustee of these annuities. Upon their reduction from 5*l.* to 4*l.* per cent., the annuities were sold at the request of the plaintiffs, and it was arranged that the money arising from the sale should be invested on mortgage to be taken with the plaintiffs' consent in William Bromley's name alone. The annuities were sold; the money arising from the sale found its way to the credit of the firm at its bankers, but was not invested on mortgage as intended, and was apparently used as partnership money. William Bromley pretended that he had invested the money, and he paid interest accordingly. Ultimately, and with the plaintiffs' knowledge, a mortgage, of which William Bromley was sole mortgagee, was appropriated as a security for the money in question. This mortgage was sufficient in point of value to cover the amount realised by the sale, and was for that amount less a few pounds, which the plaintiffs divided between them. The security thus appropriated was afterwards realised by William Bromley, and he misapplied the money, but it was not placed to the credit of the firm, nor did Joseph Bromley know anything of its receipt or application. Under these circumstances it was held that Joseph was not liable to the plaintiffs for the loss; for the plaintiffs dealt with William Bromley as a trustee and not as a partner; they authorised him to take a mortgage in his own name alone; they acquiesced in the appropriation to their money of a security which was of sufficient value; and Joseph's duty was then at an end. The plaintiffs could not hold him liable for the loss of the mortgage money arising subsequently from the fraud of the mortgagee.

* **Distinction between these cases and those noticed** [*160] **on pp. 152–155.** — In these cases it will be observed that although the money in question had at one time been in the custody of the firm, such was not the case when the money was misapplied. This circumstance distinguishes the cases last referred to from *De Ribeyrd v. Barclay* (*u*) and

Sims v. Brutton, 5 Ex. 802, noticed *Smart*, 5 Eq. 183, and 3 Ch. 646.
ante, p. 156. Compare *St. Aubyn v.* (*u*) 23 Beav. 107.

other cases of that class, the leading facts in which have been already stated (*v*).

5. **Liability of firm for trust monies.**—*If a partner, being a trustee, improperly employs the money of his cestui que trust in the partnership business, or in payment of the partnership debts, this alone is not sufficient to entitle the cestui que trust to obtain repayment of his money from the firm.*¹

In *Ex parte Apsey* (*x*), one of two assignees in bankruptcy was in partnership, and he applied part of the assets of the bankrupt in paying partnership debts. On the subsequent bankruptcy of the partnership it was held that the amount so applied was not provable against the joint estate.

In *Ex parte Heaton* (*y*), a father and his sons were partners; the sons were trustees of a will, and instead of applying the trust monies according to the trust, they appropriated them to partnership purposes: but on the bankruptcy of the partnership it was held that the amount of the monies so appropriated was not provable against the joint estate, unless it could be shown that they were employed for the use of the partnership trade with knowledge of the father, that they were trust funds; and an inquiry as to that was directed (*z*).

Distinction between these cases and *Marsh v. Keating*.—It may at first sight be thought that these cases are opposed to *Marsh v. Keating*, and the other authorities before referred to (*a*), in which the firm was held liable for money which came to its hands. But in those cases the money came to the hands of the firm in the ordinary course of its [*161] business (*b*); whilst in * the cases now under consideration it is supposed to come otherwise. Liability

(*v*) *Ante*, p. 153.

(*x*) 3 Bro. C. C. 265. See, also, *Ex parte White*, 6 Ch. 397.

(*y*) Buck. 386.

(*z*) *Ex parte Clowes*, 2 Bro. C. C. 595, is not opposed to the cases in the text, for there the joint and separate estates were consolidated.

(*a*) *Ante*, pp. 152–155.

(*b*) This may be thought incorrect with respect to *Marsh v. Keating*; but it was the business of the firm there

to sell, through their broker, stock belonging to their customers, and to receive and remit the proceeds; and the money for which the firm was held answerable did arise from the sale of the stock of a customer, though it was sold under a forged power of attorney; and although Fautleroy's partners knew nothing of the receipt of the money, their ignorance was considered culpable and of no avail.

¹ Co-partners are not held liable for trust funds although the firm have the benefit of them, unless the co-partners have knowledge of the misapplication. *Evans v. Bidleman*, 3 Cal. 435; *Harper v. Lamping*, 13 Cal. 641.

must therefore attach to the firm, if at all, on wholly different principles, and the fact that the firm has had the benefit of the trust monies, is not sufficient to render it responsible for them. To be liable, the firm must be implicated in the breach of trust, and this cannot be unless all the partners either knew whence the money came, or knew that it did not belong to the partner making use of it. Knowledge on the part of one partner will not affect the others, for the fact to be known has nothing to do with the business of the firm; and the case of *Ex parte* Heaton, already referred to, shows that in cases of this kind the liability as for a breach of trust does not extend to those who are ignorant of the matters before mentioned.

Where firm knows of the breach of trust.—But if knowledge of these matters can be imputed to the other partners, if they know, or ought to be treated as knowing that trust monies are being employed in the partnership business, they will be bound to see that the trust to which the money is subject authorises the use made of it, and will be answerable for a breach of trust in case of its misapplication or loss (*e*). It is important to bear this in mind when one partner has died; for if the surviving partners deal with his property, knowing that it belongs to his estate, knowledge of the trust on which the property is held will be imputed to them, and they may be thus involved in all the consequences of a breach of trust (*d*). But this doctrine can hardly extend to the case of incoming partners, who do nothing except leave matters as they find them when they enter the firm (*e*).

Liability for breach of trust, joint and several.—If partners are implicated in a breach of trust, their liability is joint and several (*f*): and a decree for costs will be made

(*c*) See *Ex parte* Woodin, 3 M. D. & D. 339; *Ex parte* Poulson, De Gex, 79; *Ex parte* Watson, 2 V. & B. 414; *Smith v. Jameson*, 5 T. R. 601; *Keble v. Thompson*, 3 Bro. C. C. 112, and compare *Ex parte* Geaves, 8 De G. M. & G. 291; *Ex parte* Barnewall, 6 De G. M. & G. 801; *Ex parte* Burton, 3 M. D. & D. 364.

(*d*) See *infra*, book iv. c. 3, § 3.

(*e*) See *Twyford v. Trail*, 7 Sim. 92.

(*f*) *Re* Oxford Benefit Building

Soc., 35 Ch. D. 502; *Imperial Mercantile Credit Assoc. v. Coleman*, L. R. 6 H. L. 189; *Devaynes v. Noble*, Slesch's case, 1 Mer. 563; *Baring's case*, ib. 614; *Sadler v. Lee*, 6 Beav. 324; *Brydges v. Branfill*, 12 Sim. 369; *Blair v. Bromley*, 2 Ph. 359; *Wilson v. Moore*, 1 M. & K. 127 and 337; *Ex parte* Poulson, De Gex, 79. Compare *Ex parte* Burton, 3 M. D. & D. 364. It, however, by no means follows, that on the bankruptcy of the firm,

[*162] *against them all, although they may not be all equally to blame (*g*).

Borrowing trust money.— But persons who borrow trust money from executors or trustees are only liable to repay it with interest; and although the lenders may have no authority to lend the money, the borrowers are not liable to account for the profits which they may have realised by its employment (*h*).

Following trust money.— Although a firm is not liable to make good trust money applied to its use by one of its members in breach of the trust reposed in him, unless the firm can be implicated in the breach of trust, this doctrine will not preclude a *cestui que trust* from following his own money into the hands of the firm, and demanding it back, if he can show that the firm still has it, and the firm did not come by it by purchase for value without notice. The true owner of money traced to the possession of another has a right to have it restored, not because it is a debt, but because it is his money. His right is incidental to his ownership; and whether the money is traced to the hands of a single individual, or to the hands of a firm, is wholly immaterial (*i*).

Liability of partnerships for the false representations of their members.

In considering the liability of a firm for the false representation of one of its members, it is necessary to distinguish actions for mere damages, from actions to rescind contracts, and to recover money or property, obtained by the firm by misrepresentation.¹

[*163] * **Actions for deceit.**— An action for damages for misrepresentation cannot as a general rule be maintained unless the misrepresentation is fraudulent, *i.e.*, false,

there can be a proof against the joint as well as against the separate estate. See *Ex parte* Barnewell, 6 De G. M. & G. 801. This will be discussed in the chapter on Bankruptcy.

(*g*) *Lawrence v. Bowle*, 2 Ph. 140.

(*h*) *Vyse v. Foster*, L. R. 7 H. L. 318; *Stroud v. Gwyer*, 28 Beav. 130.

(*i*) See as to tracing money, *Lewin on Trusts*, edit. 8, ch. xxx. § 2; *Re*

Hallett's estate, 13 Ch. D. 696; *Re West of England Bank*, 11 Ch. D. 773; *Brown v. Adams*, 4 Ch. 764; *Pennell v. Deffell*, 4 De G. M. & G. 372; *Frith v. Cartland*, 2 Hem. & M. 417; *Scott v. Surman*, Willes, 400; *Taylor v. Plumer*, 3 M. & S. 562; *Small v. Attwood*, Young, 507; *Pannell v. Hurley*, 2 Coll. 241.

¹ *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248.

and known so to be. to the person making it, or false and made recklessly without any reasonable ground for believing the statement to be true (*k*). There is, therefore, a difficulty in holding any person liable to such an action unless actual fraud by him can be proved. On the other hand it is difficult, if not impossible, to draw any sensible distinction between the case of fraud and any other wrong; and the weight of authority certainly is in favour of the proposition that actions for damages will lie against a principal for the fraud of his agent committed in the course of his employment, and for his principal's benefit (*l*). This doctrine obviously renders a firm liable in an action of damages for the fraud of one of its members, if committed by him in transacting the business of the firm, and for its benefit; but not otherwise (*m*).

Other actions based on fraud.—Whatever doubt there may be as to the liability of a firm to an action for deceit founded on the fraudulent statement of one of its members, there is no doubt that a firm can be compelled to restore property, or refund money, obtained by it by the misrepresentation of one of its members. Nor in such a case is it necessary to prove that the misrepresentation was fraudulent as well as false (*n*).

* In *Rapp v. Latham* (*o*), the defendants (Parry [*164] and Latham) were in partnership as wine and spirit

(*k*) See the cases in the next two notes, and Pollock on Torts, 236, &c. One exception is obscured by being referred to an implied warranty, *Lewis v. Nicholson*, 18 Q. B. 503; *Collen v. Wright*, 8 E. & B. 647, and 7 ib. 301; *Firbank's Exors. v. Humphreys*, 18 Q. B. D. 54.

(*l*) *Barwick v. English Jt. St. Bank*, L. R. 2 Ex. 259; *Weir v. Bell*, 3 Ex. D. 238; *Swire v. Francis*, 3 App. Ca. 106; *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 317; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 412; *Addie v. Western Bank of Scotland*, L. R. 1 Sc. & Div. App. Ca. 145, are the leading cases on this subject. As will be seen from them, opinions on the point greatly differ. See Pollock on Torts, 83, and the next note.

(*m*) See *British Mutual Bank. Co.*

v. Charnwood Forest Rail. Co., 18 Q. B. D. 714, where the defendants were held not liable for a fraudulent statement made by their secretary, although made in answer to inquiries which it was his apparent duty to answer. See, also, *Barnett, Hoares & Co. v. South Lon. Tramways Co.*, 18 Q. B. D. 815. Compare the cases in the last note. See, also, *Sawyer v. Goodwin*, 36 L. J. Ch. 578, where a firm was held liable for the fraudulent act of a partner who had falsified an abstract of title for the purpose of concealing prior incumbrances.

(*n*) See *Arkwright v. Newbold*, 17 Ch. D. 301; *Redgrave v. Hurd*, 20 Ch. D. 1.

(*o*) 2 B. & A. 795. The action was for money had and received, and a set-off was pleaded.

merchants, and the plaintiff employed them to purchase wine for him on commission, and to sell the same as opportunity might offer. Parry was the active partner, and he alone attended to the business of the firm. He from time to time represented that he had effected purchases and sales on the plaintiff's account, and he remitted to the plaintiff, balances alleged to be due to him on the pretended sales. The plaintiff had advanced 126,000*l.* to be laid out in the purchase of wines, and he had received, on account of pretended re-sales and profits arising therefrom, 130,000*l.* There was, however, a considerable sum advanced by the plaintiff still unaccounted for, but which the defendant Parry alleged had been invested in the purchase of wine at so much a pipe; and to recover this sum the action was brought against Parry and his co-partner. No purchase or sale had ever been made by Parry, and the whole of his representations to the plaintiff were false and fraudulent. It was contended by Latham that he was not affected by the fraud of his co-partner, inasmuch as the fictitious purchases and sales were not in the ordinary course of trade, and were not, therefore, partnership transactions. But it was held that he was bound by the acts and representations of his partner Parry, and could not be allowed to say that those transactions were fictitious which Parry had represented to be real. The plaintiff was adjudged entitled to retain the 130,000*l.* remitted to him, and to recover back the advances for the supposed purchases in respect of which there had been no remittance.

Again, where one of several partners in a patent induced the plaintiff, by false and fraudulent representations, to pay 3,000*l.* for part of the profits to be obtained by its working, all the partners were held liable to repay the money, although there was no evidence of fraud on the part of more than one (*p*).

[*165] * The case of *Blair v. Bromley* (*q*), already alluded to, is another instance in point, and was in fact decided by the Lord Chancellor expressly upon the ground that persons who, having a duty to perform, represent to those who are interested in the performance of it that it has been performed, make themselves responsible for all the consequences of non-performance; and as one partner may bind

(*p*) *Lovell v. Hicks*, 2 Y. & C. Ex. 46 and 481.

(*q*) 5 Ha. 542, and 2 Ph. 354, *ante*, p. 153.

another as to any matter within the limits of their joint business, so he may by an act which, though not constituting a contract by itself, is on equitable principles considered as having all the consequences of one.

False accounts rendered by one partner. — Whether accounts, rendered by one partner in the name of the firm and showing that money is in the hands of the firm when in truth he has misapplied it, are to be treated as representations by the firm, is a question which has given rise to much discussion and upon which the cases are not uniform. But upon the whole it is conceived that if the accounts relate to matters within the scope of the partnership business the firm is bound by them (*r*).

Statutory exceptions. — By 9 Geo. IV. c. 14, § 6, a firm is not liable for a false and fraudulent representation as to the character or solvency of any person unless such representation is in writing signed by all the partners. The signature of one partner in the name of the firm will not bind any one but himself (*s*).

Liability of firm for untrue statement as to authority. — If a partner, acting apparently beyond the limits of his authority, untruly represents that he is acting with his co-partners' consent, they are not bound by this representation, nor are they liable for what may be done on the faith of it.

Therefore in *Ex parte Agace* (*t*), where one partner gave partnership bills in payment of his own separate debt, and on * being asked whether his co-partner was ac- [*166] quainted with the transaction, untruly replied that he was, and that he consented to it; it was held that the bills were not provable against the joint estate of the firm, they not being in the hands of a *bonâ fide* holder for value, without notice of the circumstances under which they had been given. In this case, the partner who gave the bills did that which was clearly not within the scope of his authority, and the person who took them knew it. The latter was, it is true,

(*r*) See the two last cases, and *Rapp. v. Latham*, 2 B. & A. 795, *ante*, p. 164; *Marsh v. Keating*, 2 Cl. & Fin. 250; *Devaynes v. Noble*, Baring's case, 1 Mer. 611; *De Ribeyre v. Barclay*, 23 Beav. 107. See, on the other hand, *Hume v. Bolland*, 1 Cr. & M. 130; *Sims v. Brutton*, 5 Ex. 802.

(*s*) See *Swift v. Jewsbury*, L. R. 9 Q. B. 301, reversing *Swift v. Winterbotham*, L. R. 8 Q. B. 244. In this case the letter was signed by A. B., manager, but the words of the statute as construed by the Court of Appeal, warrant the statement in the text.

(*t*) 2 Cox, 312.

misled by the false answer to his question, but that answer was not referable to a matter within the scope of the partnership business; and the other partner did nothing to lead to the supposition either that he was a consenting party, or that he had authorised his co-partner to say that he was (*u*).

Untrue statement as to nature of business.—A question of more difficulty arises when a partner alleges that the business of the firm is more extensive than it really is, or that it is different from what it is. But even in this case the firm would probably be held not liable for such a misrepresentation.¹ *Ex hypothesi* the representation is not referable to anything falling within the scope of the partnership business; and it would probably be contended in vain that each partner was impliedly authorised by his co-partners to answer questions as to what business they really carried on in partnership. If the person seeking to make the firm liable knew anything of the firm and of its business as ordinarily carried on, then *Ex parte* Agace is an authority to show that he could not succeed. If he knew nothing of the firm, he would be in the position of a person dealing with an agent whose authority is wholly unknown. Now an agent whose authority is wholly unknown cannot bind his principal by misrepresenting the authority conferred (*v*); and it is difficult, therefore, to see upon what principle a partner could, in the case now supposed, bind the firm by misrepresenting his authority, or by misrepresenting the nature of the business of the firm which, as to strangers, determines that authority. [167] A member of a banking * firm could hardly bind it by underwriting a policy in the name of the firm, and by untruly representing that he and his partners were insurers as well as bankers.

Fraud inducing a person to join the firm.—It is not necessary, in order to carry on the business of a firm in the ordinary way, that any of its partners should have power to induce other persons to join the firm. Hence if one partner induces a person by fraud, to join the firm, such fraud cannot be

(*u*) See, also, *Kendal v. Wood*, L. R. 6 Ex. 243, and *per Kelly*, C. B., in *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 879 and 880.

(*v*) See *Story on Agency*, § 134, &c. The case supposes that *all* that is known about the agent's authority is what he himself says.

¹ *Heffron v. Hannaford*, 40 Mich. 305; *Kaiser v. Fendrick*, 98 Penn. St. 528; *Selden v. Bank of Commerce*, 3 Minn. 166.

imputed to the firm, unless the partner in question had express authority to seek for a new partner, or unless the other members of the firm ratify the fraud when made aware of it. If, however, the incoming partner has brought in money to the firm, a retention of the money by the firm, with knowledge of the fraud, would amount to a ratification thereof, and would be equivalent to a fraud by all the partners in the first instance. Hence they cannot retain the money, as has been already seen (*x*).

SECTION IV.—LIABILITY OF PARTNERS IN RESPECT OF ACTS WHICH ARE UNAUTHORISED AND ARE KNOWN SO TO BE.

Excess of authority.—By law every member of an ordinary partnership is the agent of the firm, so far as is necessary for the transaction of its business in the ordinary way, and to this extent his authority to act for the firm may be assumed by those who know nothing of the real limits of his authority. If his co-partners have restricted his authority to narrower limits (which they are perfectly at liberty to do (*y*)), still they will be bound to all persons dealing with him *bonâ fide* without notice of the restriction, so long as he acts within the wider limits set by law, as above explained.¹ On the other hand, if a person seeks to fasten upon the firm liability in respect of some act of one of the members which does not fall within the limits of his authority as set by law, a more extensive authority must be shown to have been actually conferred upon him by the other partners; and if no sufficient authority can be shown, the firm will not * be liable, even though the person seeking to charge [*168] it had no notice of the real authority possessed by the partner with whom he dealt.¹

(*x*) See *Lovell v. Hicks*, 2 Y. & C. Ex. 46 and 481, noticed *ante*, p. 164. (*y*) See *infra*.

¹ *Stimson v. Whitney*, 130 Mass. 595; *Warren v. Truck*, 6 Allen, 317; *Blodgett v. Weed*, 119 Mass. 215; *United States Bank v. Binney*, 5 Mason, 176; *Winship v. Bank of United States*, 5 Pet. 551, 560; 8 L. ed. 216; *Kimbro v. Bullitt*, 22 How. 256, 16 L. ed. 317.

¹ See *Brent v. Davis*, 9 Md. 217; *Langan v. Hewett*, 21 Miss. 122; *Selden v. Bank of Commerce*, 3 Minn. 166; *Chazournes v. Edwards*, 3 Pick. 5; *Eastman v. Cooper*, 15 Pick. 276.

Notice of want of authority.—The immateriality of notice of want of authority in the last case, and its materiality in the former, is a necessary consequence of the law of agency. A firm can only be made liable for what is done by one of its members on the supposition that the act in question was authorised by the other members. Now, as by law they are held *primâ facie* to authorise all acts necessary for carrying on the business of the firm in the usual way, they cannot escape liability for any act of this character unless they can show that the apparent authority to do it did not exist, and was known not to exist. But when it is sought to make the firm liable for some act not *primâ facie* authorised by it, an actual authority by it must be shown: and if this cannot be done, no case is made out against the firm, however ignorant the person seeking to charge it may have been of what was authorised and what was not. In the case now supposed the firm did not mislead him; and if he was misled by the representations of the partner with whom he dealt, his remedy is against that partner (*z*); just as when an agent untruly represents his authority, a person, dealing with him, acquires no right against the principal, but must look to the agent for indemnity (*a*).

From the above observations it follows that actual notice of excess of authority becomes important only where the firm seeks to escape liability for some act done by one of its members, with the apparent, but without the real authority of the others. So long as one partner does nothing beyond the scope of his apparent authority, as determined by the principle already explained, so long is the firm responsible for his conduct, although he may have acted beyond or in direct violation of the authority within which his co-partners may have attempted to confine him. Restrictions placed by the partners upon the powers which each shall exercise do not [*169] affect *non-partners, who act *bonâ fide* and without notice of the restriction (*b*). If, for example, the business of a firm requires a subdivision of labour, and it is

(*z*) *Ante*, pp. 164 *et seq.*; see, too, *Lloyd v. Freshfield*, 9 Dowl. & Ry. 19.

(*a*) See, as to the liability of the agent in such a case, *Collen v. Wright*, 7 E. & B. 301, and 8 ib. 647; and *ante*, p. 163, note (*k*).

(*b*) As regards such persons, it is of no use for one partner to tell the others he will not be bound by their acts. See *Gleason v. Tinkler*, Holt, N. P. Ca. 586. It is otherwise where there is notice. See *Ex parte Holdsworth*, 1 M. D. & D. 475.

agreed between the partners that one shall attend to one department and another to another, the firm will nevertheless be bound by the acts of one of the partners out of his department, provided they are such as, on the principles already explained, would be binding on the firm (*c*).

Cases of fraud on firm, but no notice of it. — So, if one partner acts in fraud of his co-partners, still they will be bound, if he has not exceeded his apparent authority, and if the person dealing with him had no notice of the fraud.¹ Thus, in *Bond v. Gibson* (*d*), where one partner ordered goods on the credit of the firm, and immediately pawned them for his own benefit, the firm was held liable for the price of the goods. So, if one member of an ordinary trading partnership draws, accepts, or indorses a bill in the name of the firm, but for some private purpose of his own, and in fraud of his co-partners, they will be liable upon the bill at the suit of any holder for value, without notice of the fraud (*e*).²

(*c*) *Morans v. Armstrong*, Arm.
McArt. & Ogle, Ir. N. P. Rep. 25.

(*d*) 1 Camp. 185.

(*e*) *Ex parte* Bushell, M. D. & D.
615; *Ex parte* Meyer, De Gex, 632
(an accommodation bill); *Lane v.*

¹ A broker, in fraud of his partner, after a dissolution not communicated to the plaintiff, indorsed the firm name on notes which had been left with the firm by the plaintiff to get discounted, and applied the proceeds of the notes to his own use. *Held*, that both partners were liable. *Hammond v. Heward*, 11 Ont. C. P. 261.

Plaintiff took *bonâ fide* for value before due the note of his debtor to order of a third person, and indorsed by that person and by the firm of J. & J. C., knowing nothing of the circumstances under which it was indorsed by the firm. *Held*, that it was no answer to the plaintiff's claim that the partner who indorsed the note with the firm name had no authority. *Henderson v. Carveth*, 16 Ont. Q. B. 324.

If one partner dissents, having the right so to do, the person contracting with the others, with notice of the dissent, cannot look to the dissenting partner. *Yeager v. Wallace*, 57 Penn. St. 365; *Pollock v. Williams*, 42 Miss. 88.

The president and managing partner of the Limited Liability Coal Company, assuming to act for the firm, agreed with L. that L. should buy B.'s (a retiring partner's) share, and pay into the partnership a sum of money, being the balance due on B.'s share, and should thereby have one-fourteenth interest in the partnership property free from all liens. The money was so paid; but the other partners had no knowledge of the agreement for an unincumbered title. Afterward the partnership property was all sold under a prior mortgage. *Held*, that L. had no remedy against the firm. *Love v. Payne*, 73 Ind. 80; s. c. 38 Am. Rep. 111; *Brent v. Davis*, 9 Md. 217; *Urquhart v. Powell*, 54 Ga. 29; *Monroe v. Conner*, 15 Me. 178; *Johnston v. Dutton*, 27 Ala. 245.

² A person who takes the paper of the firm for the private debt of a member of the firm, or for a transaction outside the business of the firm, must show that he took it for value and without notice of the fraud, and also the

So, as has been already seen, if one partner fraudulently misapplies money for which the firm is answerable, the firm is liable to make it good, although the other partners may have been grossly deceived, and may themselves have been morally blameless (*f*).

[*170] * **Liability of retired partner in the absence of notice.**

— Upon the same principle, if a person known to be a partner retires, and does not notify his retirement, he will continue to be bound by the acts of his late partners as if his partnership with them continued (*g*).

Cases of restricted authority and notice of it.— On the other hand, a person who has notice that the authority of a partner is restricted, cannot hold the firm liable if he chooses to deal with that partner in a matter beyond his authority as restricted (*h*). Therefore, where the defendant, who was in partnership, sent the plaintiff a circular telling him not to supply goods to the firm without the defendant's written order, and the plaintiff, notwithstanding, supplied goods to the defendant's partner, it was held that the defendant was not liable for the goods (*i*). So, the authority of any partner to accept bills in the partnership name may be determined by a public notice, and such notice will affect those whom it reaches, subject to the qualification that an indorsee

Williams, 2 Vern. 277; Wintle v. Crowther, 1 Cr. & J. 316; Thicknesse v. Bromilow, 2 ib. 425; Ridley v. Taylor, 13 East, 175; Sanderson v. Brooksbank, 4 Car. & P. 286; Lewis v. Reilley, 1 Q. B. 349; Sutton v. Gregory, 2 Peake, 150; Swan v. Steele, 7 East, 210. See, as to the plea of non accepit, Jones v. Corbett, 2 Q. B. 828. It is now settled that if a bill is drawn or accepted by one partner in fraud of the firm, the holder cannot recover against the firm unless he can show that he gave value for the bill. Hogg v. Skene, 18 C. B. N. S. 426, explaining Musgrave v. Drake, 5 Q. B. 185, which was supposed to be to the contrary.

See, also, Bailey v. Bidwell, 13 M. & W. 73; Smith v. Braine, 15 Jur. 287, Q. B., and 16 Q. B. 244; Harvey v. Towers, 6 Ex. 656; Berry v. Alderman, 14 C. B. 95; Heath v. Sansom, 2 B. & Ad. 291.

(*f*) *Ante*, pp. 151 *et seq.*

(*g*) This subject will be alluded to hereafter, see c. 2, § 3.

(*h*) Alderson v. Pope, 1 Camp. 404, stated and observed upon hereafter.

(*i*) Willis v. Dyson, 1 Stark. 164; Minnit v. Whitney, Vin. Ab. Partn. A. pl. 12, and 5 Bro. P. C. 489. See, too, Vice v. Fleming, 1 Y. & J. 227; *Ex parte* Holdsworth, 1 M. D. & D. 475.

authority of the partner to thus use the name of the firm. Chazournes v. Edwards, 3 Pick. 5; Eastman v. Cooper, 15 Pick. 276; Commonwealth Bank v. Law, 127 Mass. 72; Royal Canadian Bank v. Wilson, 24 Ont. C. P. 362; Selden v. Bank of Commerce, 3 Minn. 166; Himelright v. Johnson, 40 Ohio St. 40.

with notice may avail himself of the ignorance of his indorser (*k*).

In *Galway v. Mathew* (*l*) the defendants, Mathew and Smithson, were partners; Smithson caused an advertisement to be published warning all persons not to give credit to Mathew on his, Smithson's, account, and stating that he would not be liable for any bills or notes issued by Mathew in the name of the partnership. The plaintiff had seen this advertisement, but he was nevertheless prevailed upon by Mathew to accept a bill for the accommodation of the firm, taking in exchange a promissory note drawn by Mathew in the name of the firm. Mathew got the bill discounted, and *bond fide* applied almost all of the money thus procured in payment of the debts of the firm. The plaintiff paid his acceptance at maturity, and * then brought an [*171] action against the firm on the note. But it was held that, having seen the advertisement, he could not recover.

Restricted powers not inconsistent with continuance of partnership. — It will be observed that in these cases the notices were effectual though the partnership was not determined. The continuance of the partnership is not inconsistent with a notice by one partner that as to some particular matter he will not be bound by the acts of his co-partner (*m*).

Bills accepted in name of firm for private debt. — Again, a person who knows that a partner is using the name or assets of the firm for a private purpose of his own, knows that he is *primâ facie* committing a fraud on his co-partners. Therefore, notwithstanding the implied power of a member of an ordinary trading firm to accept bills or make notes, if one partner accepts a bill or makes a note in the name of the firm, and gives the bill or note in payment of a private debt of his own, the creditor who takes the bill or note, knowing the circumstances under which it has been accepted or made, will not be able to enforce it against the firm, unless it was, in fact, given with the authority of the other partners, which

(*k*) *Rooth v. Quin*, 7 Price, 193.

(*l*) 1 Camp. 402, and 10 East, 264. See, too, *Ex parte Holdsworth*, 1 M. D. & D. 475, where the drawer of bills accepted by the firm had notice that they were accepted without authority. See, further, on this point, *infra*, p. 174.

(*m*) See, in addition to the cases cited in the last few notes, the judgment of L. J. Bramwell in *Bullen v. Sharp*, L. R. 1 C. P., pp. 125-6, and the judgment in *Vice v. Fleming*, 1 Y. & J. 227.

it is for the creditor to prove (*u*). And if a bill is drawn by one partner in the name of the firm in fraud of his co-partners, and is accepted by the drawee, and is afterwards indorsed by the drawer in the name of the firm, the acceptor may successfully deny the indorsement, although he cannot deny the drawing (*o*).

Again, although a partner may be a *bonâ fide* holder, for his own separate use, of the paper of his firm, yet if he gives such paper in payment of a separate debt of his own, this is *primâ facie* an irregular proceeding and a fraud on his co-partners. Consequently, the creditor taking the [*172] paper * must rebut this *primâ facie* inference before he can compel the firm to pay (*p*). A *bonâ fide* holder for value without notice is of course in a different position (*q*).¹

(*u*) *Leverson v. Lane*, 13 C. B. N. S. 278, and 3 Fos. & Fin. 221; *Re Riches*, 4 De G. J. & S. 581, and 5 N. R. 287. See, also, *Ellston v. Deacon*, L. R. 2 C. P. 20. Older cases to the same effect are *Wells v. Masterman*, 2 Esp. 731; *Green v. Deakin*, 2 Stark. 347; *Ex parte Thorpe*, 3 M. & A. 716; *Ex parte Austen*, 1 M. D. & D. 247; *Arden v. Sharpe*, 2 Esp. 524; *Ex parte Agace*, 2 Cox, 312; *Miller v. Douglass*, 3 Ross, L. C. 500; *Ex parte Bonbonus*,

8 Ves. 540; *Frankland v. M'Gusty*, 1 Knapp, 274; and see *post*, p. 173.

(*o*) *Garland v. Jacomb*, L. R. 8 Ex. 216.

(*p*) See *Leverson v. Lane*, 13 C. B. N. S. 278, and *Re Riches*, 4 De G. J. & S. 581, and 5 N. R. 287, qualifying *Ex parte Bushell*, 3 M. D. & D. 615, and *Ridley v. Taylor*, 13 East, 175, in which the contrary doctrine was countenanced.

(*q*) See *ante*, p. 169.

¹ See *ante*, cases collected in note 1, p. 129. See also *King v. Faber*, 22 Penn. St. 21; *Cooper v. McClurkan*, id. 80; *Hickman v. Reineking*, 6 Blackf. 388; *Bailey v. Clark*, 6 Pick. 372; *Hickman v. Kunkle*, 27 Mo. 401; *Boardman v. Gore*, 15 Mass. 330; *Baird v. Cochran*, 4 S. & R. 397; *Brent v. Davis*, 9 Md. 217; *Lanier v. McCabe*, 2 Fla. 32; *Coleman v. Bellhouse*, 9 Ont. C. P. 31; *Wilson v. Williams*, 14 Wend. 146; *Nolan v. Lovelock*, 1 Montana, 224; *Burleigh v. Parton*, 21 Tex. 585; *Baxter v. Clark*, 4 Ired. L. 127; *Williams v. Gilchrist*, 11 N. H. 535; *Dow v. Sayward*, 12 id. 271; *Bromley v. Elliott*, 38 id. 287, 303; *Mason v. Partridge*, 66 N. Y. 633; *Hastings v. Hopkinson*, 28 Vt. 108; *Chapman v. Devereux*, 32 id. 616; *Anthony v. Wheatons*, 7 R. L. 490; *Pollock v. Williams*, 12 Miss. 122.

A. & B., partners, agreed to sell C. a lot of flour, to be paid for on each hundred barrels delivered. A.'s son produced a voucher to C. for delivery of the first hundred barrels, and received from C. check in favor of A. & B. in payment, and then his attention was called to the fact that C. held A.'s note for £40 for a private debt. He took up this note out of the proceeds of the check. B. then refused to deliver more flour on the agreement unless the £40 was repaid to the firm. C. sued the firm for breach of contract and recovered, there being no evidence of any understanding between C. and A.'s son that when the former paid for the hundred barrels the private note should be taken out of it. *Brunskill v. Chummasero*, 5 Ont. Q. B. 474.

Pledge of partnership goods for private debt. — As a partner has no implied authority to pledge the partnership name for purposes of his own, so neither has he, for similar purposes, any implied power to pledge its goods. Therefore, if two firms are jointly interested in consignments, and one of them pledges the bills of lading with its bankers as a security for advances on its separate account, the bankers cannot hold those goods against the other firm, if they knew when the goods were pledged what the real facts were respecting them (*r*). So, if one partner pays a separate debt of his own with money of the firm, and the creditor who is paid is aware of the facts, he cannot retain the money as against the firm, unless he can prove that the payment was authorised by the other partners; or unless they have estopped themselves from denying the authority (*s*).²

Private bargain by one partner. — Another case, illustrating the want of authority of one partner to bind the firm by

(*r*) *Snaith v. Burrigge*, 4 Taunt. 243; *Heilbut v. Nevill*, L. R. 4 C. P. 684. 354, and 5 ib. 478. See further as to

(*s*) *Kendal v. Wood*, L. R. 6 Ex. such cases, *ante*, pp. 165, 166.

That part of the debt for which partner gives note in the firm name was for money that went into the business of the firm does not cure its irregularity. *McCord v. Field*, 27 Ont. C. P. 391.

But otherwise if he gives firm note to replace his individual note, the whole proceeds of which went into the partnership. *Union Bank v. Eaton*, 5 Humph. 499.

B., a member of a firm of which he and A. were partners, fraudulently made a promissory note in the name of the firm, and delivered to C., who had knowledge of the fraud. C. delivered it to D., an innocent holder, for value. The firm was afterwards dissolved, and a receiver appointed. D. brought an action at law upon the note. A. then brought a bill in equity against B. & C., the prayer of which was that C. might be ordered to pay, take up, and cancel the note, and be restrained from enforcing it. Held, that the bill could not be maintained. *Fuller v. Percival*, 126 Mass. 381.

If it is within the ordinary course of a partnership business for one partner to borrow money on the credit of the firm, proof that a loan was made to the firm at their place of business through one of the partners at six per cent upon a statement by the latter that the firm could use the money to advantage at that rate; that the lender took a transfer of bank stock as collateral security, and that he knew that the partner with whom he transacted the business owned real estate in which the firm was not interested, is not sufficient to affect the lender, if he acted in good faith, with constructive notice of fraud in such partner in procuring the money for his own personal use. *Warren v. French*, 6 Allen, 317. And see *Onondaga Co. Bk. v. De Puy*, 17 Wend. 47; *Church v. Sparrow*, 5 id. 223.

² *Fuller v. Percival*, 126 Mass. 381. In this case a bill was maintained against a partner and one who took a note with notice of fraud to compel them to cancel the note and restrain them from enforcing it. And see *Peirsall v. Elliott*, 6 Pet. 95, 8 L. ed. 332; *Story*, Eq. 694.

transactions enuring only to his advantage, is afforded by *Bignold v. Waterhouse* (*t*). There the defendants were proprietors of a coach running between London and Norwich, and they, by notice affixed in their office, stated that they would not be accountable for any parcel above the value of 5*l.*, unless the same was entered and paid for accordingly. The plaintiffs were bankers at Norwich, and one of the defendants, for a consideration moving to him alone, agreed that the plaintiffs' parcels should always go free by the coach. This agreement was acted on for some time, but it did not appear that the other defendants were aware of its existence, or of the fact that the plaintiffs were treated differently from other people. A parcel of the plaintiffs' sent by the coach being lost, it was held that the contract entered into [*173] by *the one defendant was not binding on the others, and that they were not liable for the loss of the parcel, its value not having been declared as required by the notice.

Fraud on incoming partners.—The same principle was acted upon in the important and well-known case of *Shirreff v. Wilks* (*u*). There the plaintiffs sold some porter to Bishop and Wilks, who were partners; and the porter was entered in the plaintiffs' books in the names of Bishop and Wilks. Afterwards, Robson became a partner with Bishop and Wilks, and the plaintiffs, knowing this, drew a bill on all three partners for the price of the porter, and Bishop accepted the bill in the name of the three. It was held that Robson was not liable on this bill, there being no evidence to show that he knew anything of it. Lord Kenyon went so far as to say that the transaction was fraudulent on the face of it; but that is going rather far, as it is not uncommon for in-coming partners to agree to take upon themselves the existing liabilities of the firm. When such an agreement is entered into, the in-coming partner can hardly say he has been defrauded, if a bill in the name of the new firm is accepted for a debt of the old firm without any specific authority on his part. But if the creditor cannot show an authority on the part of the in-coming partner for the acceptance of a bill in his name for a debt of the old firm, the principle acted on in *Shirreff v. Wilks* will apply, for that case is clear law, and has often been followed as such (*x*).

(*t*) 1 M. & S. 255.

(*u*) 1 East, 48.

(*x*) See *ante*, p. 171, and *Ex parte*
Goulding, 2 Gl. & Jam. 118; Wilson

Liability of retired partners after notice.—The doctrine that a person who deals with a partner, knowing that he is exceeding his authority, cannot impute the acts of that partner to the firm, is further illustrated by the decisions establishing the non-liability of a retired partner for acts done by his co-partners after notice of his retirement. These decisions will be examined at length hereafter.

Notice of private stipulations of partners.—Granting that a person, knowing the limits of a partner's authority as set by his co-partners, cannot hold them responsible for an act done by him in excess of his authority, it still remains to determine the effect of notice by non-partners of stipulations entered into between the partners themselves.

* In *Galway v. Mathew (y)*, Lord Ellenborough is [*174] reported to have said, "It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the other: *They may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it in breach of such stipulation.*

Again, in *Alderson v. Pope (z)*, the same judge held "that where there was a stipulation between A., B., and C., who appeared to the world as co-partners, that C. should not participate in profit and loss, and should not be liable as a partner, C. was not liable, as such, to those who had notice of this stipulation."

Principle examined.—These dicta appear to authorise the statement that if partners stipulate amongst themselves that certain things shall not be done, no person who is aware of the stipulation is entitled to hold the firm liable for what may be done by one of the members contrary to such stipulation. But it is submitted that this proposition is too wide. A stranger dealing with a partner is entitled to hold the firm liable for whatever that partner may do on its behalf within certain limits. To deprive the stranger of this right, he ought to have distinct notice that the firm will not be answerable for the acts of one member, even within these limits (a).

v. Lewis, 2 Man. & Gr. 197, and 9 Dowl. Pr. Ca. 18, *sub nomine* Wilson *v. Bailey*.

(y) 10 East, 264.

(z) 1 Camp. 404.

(a) See, as to the sufficiency of such notices, *Vice v. Fleming*, 1 Y. & J. 227.

Now notice of an agreement between the members that one of them shall not do certain things is by no means necessarily equivalent to notice that the firm will not be answerable for them if he does. For there is nothing inconsistent in an agreement between the members of a firm that certain things shall not be done by one of them, and a readiness on the part of all the members to be responsible to strangers for the acts of each other, as if no such an agreement had been entered into. It is immaterial to a stranger what stipulations partners may make amongst themselves, so long as they do not seek to restrict their responsibility as to him; and it is only when knowledge of an agreement between partners necessarily involves knowledge that they decline to be responsible for the acts of each other within the [*175] *ordinary limits, that a stranger's rights against a firm can be prejudiced by what he may know of the private stipulations between its members.¹

Observations on *Galway v. Mathew*; and on *Alderson v. Pope*. — In *Galway v. Mathew* (*b*), the plaintiff's knowledge of want of authority was derived, not from notice of any agreement between the partners, but from an advertisement published by one of them, warning all persons that he would no longer be liable for drafts drawn by the others on the partnership account (*c*). The passage, therefore, in the judgment extracted above, was by no means necessary for the decision of the case. With respect to *Alderson v. Pope* (*d*), if all that was

(*b*) 1 Camp. 403, and 10 East, 264,
and *ante*, p. 170.

Vin. Ab. 244, and 5 Bro. P. C. 489;
Willis v. Dyson, 1 Stark. 161.

(*c*) Distinct notice to the same effect
existed in *Minnit v. Whitney*, 16

(*d*) 1 Camp. 404.

¹ Transactions by one partner in the name of the firm within the scope of the partnership business will be sustained as to third persons dealing in good faith, although contrary to a private agreement between the partners. *Cuvillier v. Gilbert*, 18 Low. Can. J. 22.

Secret restrictions on the powers of the partners in the articles, or agreed upon for the particular transaction, do not affect the public, which continues to deal with the partnership according to the ordinary course of the business in which the partnership is engaged. *Maltby v. N. W. Va. R. R.*, 16 Md. 422; *Brent v. Davis*, 9 Md. 217; *Stimson v. Whitney*, 130 Mass. 591; *Cargell v. Corby*, 15 Mo. 425; *McNeish v. Hullest Oat Co.*, 57 Vt. 316; *Nichols v. Cheairs*, 4 Sneed, 229 (Tenn.); *Everitt v. Chapman*, 6 Conn. 347; *Seybold v. Greenwald*, 1 Disney, 425; *Tillier v. Whitehead*, 1 Dall. 269; *Churchman v. Smith*, 6 Whart. 146; *Hoskinson v. Elliot*, 62 Penn. St. 393; *Lomme v. Kintzing*, 1 Mont. 290; *Devin v. Harris*, 3 G. Greene, 186 (Iowa).

Otherwise, of course, if the third party dealing with the partnership is

meant was that a person knowing that C. did not authorise A. or B. to act on his behalf, could not hold C. liable for their acts, the case presents no difficulty; but if anything more than this was meant, the authority of the decision becomes at least doubtful: for it has been held in another case that a person who holds himself out as a partner with others with whom he has no concern, is liable for their acts, even to persons having notice of the true state of affairs; and the decision was based upon the very ground that a person, who holds himself out as a partner with others, expresses his readiness to incur the responsibilities of a partner as regards strangers, whatever he may intend shall be the case between him and those with whom he associates his name (*e*).

Private stipulations restrictive of liability. — Against the general proposition in question it may be further urged, that if partners agree not to be liable beyond a certain amount, and a stranger has notice of that agreement, the notice avails nothing against him. Such an agreement, coupled with notice of it on the part of a person dealing with the firm, is by no means equivalent to a contract between him and it, that he shall not hold the members responsible beyond the amount which they may have agreed between themselves to contribute respectively (*f*).

* **Contracts on the basis of such stipulations.** — The [*176] writer is not acquainted with any case in which it has been *decided* that persons who are aware of the terms upon which partners have agreed together to carry on business are deemed to contract with them upon the basis of the agreement come to amongst the partners themselves. In all cases of this description, the real question to be determined seems to be whether there was distinct notice that the firm would not be answerable to strangers for acts which, without such notice, would clearly impose liability upon it; and whenever there is any doubt upon this point, the firm ought clearly

(*e*) *Brown v. Leonard*, 2 Chitty, 120.

(*f*) See *Greenwood's case*, 3 De G. M. & G. 476.

affected by notice of the private agreement, and *also notice* that the firm would not be answerable for acts in themselves proper. It might well be that the firm took the risk of a partner's breaking his private agreement with his co-partners by acting in the forbidden matter, and was content to be bound to the third party, and settle with its partner for his violation of the agreement.

to be liable, the *onus* being on it to show sufficient reason why liability should not attach to it (*g*).

SECTION V.—OF THE LIABILITY OF PARTNERS IN RESPECT OF CONTRACTS NOT ENTERED INTO ON BEHALF OF THE FIRM, OR NOT SO IN PROPER FORM.

Observations on foregoing propositions.—The general proposition that a partnership is bound by those acts of its agents which are within the scope of their authority, in the sense explained in the foregoing pages, must be taken with the qualification that the agent whose acts are sought to be imputed to the firm, was acting in his character of agent, and not as a principal. If he did not act in his character of agent, if he acted as a private individual on his own account, his acts cannot be imputed to the firm, and he alone is liable for them, even though the firm may have benefited by them. Whether a contract is entered into by an agent as such, or by him as a principal, is often, but not always, apparent from the form of the contract.

With reference to the forms of contracts, it will be convenient to consider—

1. Contracts under seal.
2. Ordinary contracts not under seal.
3. Bills of exchange and promissory notes.

[*177]

*1. *Contracts under seal.*

Covenants, &c.—A distinction is taken between deeds and other instruments with respect to the person bound by them.¹ If a deed is executed by an agent in his own name,

(*g*) See *Hawken v. Bourne*, 8 M. & W. 703, where the defendant was held liable for goods supplied to a mine, though the prospectus of the mining company stated that all goods were to be bought for cash prices and no debt was to be incurred.

¹ The very form of a sealed instrument gives notice to the third party to question the partner's authority to execute it. It is well settled that a partner cannot bind his co-partners by deed, and generally where the transaction is one that requires the execution of a sealed instrument for its completion one partner cannot bind the firm. If the instrument requires a seal, one partner cannot so execute it as to bind the other without previous authority or subsequent ratification. *Sibley v. Young*, So. Car. S. C. April, 1887. 2 S. E. Rep. 314.

he and he only can sue or be sued thereon, although the deed may disclose the fact that he is acting for another (*h*). Therefore, where a partner *covenants* that anything shall be done, he and he only is liable on the covenant, and the firm is not bound thereby to the covenantee (*i*). A person who

(*h*) *Appleton v. Binks*, 5 East, 148;
Pickering's case, 6 Ch. 525; and see
next note.

(*i*) *Hancock v. Hodgson*, 4 Bing.
269; *Hall v. Bainbridge*, 1 Man. &
Gr. 42.

Even if he have the entire management of the partnership business, that will not raise a legal presumption that such execution is the act of the partnership. *Ibid*.

In an action on a sealed agreement there was proof of execution by one plaintiff only in behalf of himself and his partners. Held that the action could not be maintained. *French v. Weir*, 17 Ont. Q. B. 245.

Where a bond was given to the firm, but in the name of a partner since deceased, the court, in an action on the bond, rightly instructed the jury that "if they believed that the bond in evidence was given for a debt contracted prior to the dissolution of the partnership, the name of the partnership could be used after the dissolution and the suit maintained by the surviving partner." *Stillwell v. Gray*, 17 Ark. 473; *Banorsee v. Hovey*, 5 Mass. 11; *Harris v. Miller*, 1 Meigs, 158; *Boston and Colorado Smelting Co. v. Smith*, 13 R. I. 27; s. c. 43 Am. Rep. 3; *Willis v. Hill*, 2 Dev. & B. L. 231; *Kimball v. Tucker*, 10 Mass. 192; *North Penn. Coal Co.'s Appeal*, 45 Penn. St. 181; *Blume v. McClurken*, 10 Watts, 380; *Tuttle v. Eskridge*, 2 Munf. 330; *Eames v. Preston*, 20 Ill. 389; *Bewley v. Tams*, 17 Penn. St. 485; *Purviance v. Sutherland*, 2 Ohio St. 478; *Linney v. Dare*, 2 Leigh, 588; *Salé v. Dishmar*, 3 id. 548; *Kyle v. Roberts*, 6 id. 495.

Where one partner executed, without authority of his co-partners, an instrument under seal to secure a debt due from the firm, the fact that the firm acknowledged their liability on the open account which the sealed instrument was given to secure, does not ratify it. *Sibley v. Young, So. Car. S. C. April, 1887*. 2 S. E. Rep. 314.

The defendants, partners, agreed under seal to buy merchandise, one signing the firm name opposite one seal. The one signing did so in the other's presence and with his assent, and it was held that both were bound. *Moor v. Boyd*, 23 Ont. Q. B. 459; *id.* 15 Ont. C. P. 513; and see *Logan v. Stranahan*, 12 Ont. Q. B. 15. And when the one who did not sign acted under the instrument, unnecessarily under seal, and received the benefit of it, it was sustained as his deed. *Bloomley v. Grinton*, 9 Ont. Q. B. 455; *Hutchinson v. Johnston*, 4 All. (N. B.) 40.

An exception is made in cases where the instrument does not require a seal. If it does not require a seal, the use of a seal does not prevent the act from binding the firm. *Hurrey v. Bank of N. S. W.*, 1 New Zea. L. R. 115, C.A.; *Glass v. Shaw*, "Argus" Rep. Nov. 29, 1858, Victoria; *Hutchinson v. Johnston*, 4 All. 40 (N. B.); *Bloomley v. Grinton*, 9 Ont. Q. B. 455; *Lucas v. Bank*, 2 Stew. 297.

In *Walsh v. Lennon*, 98 Ill. 27; s. c. 38 Am. Rep. 75, it was held that one partner may bind the partnership by a sealed note, executed in the firm name, for a loan of money for the partnership business, so far at least as to warrant a recovery under the common counts, by bringing in the note to be cancelled. See *Schmertz v. Shreve*, 62 Penn. St. 457; s. c. 1 Am. Rep. 439, to same effect.

There are many authorities to the position that while one partner cannot bind his co-partners by deed, yet if the instrument used in commercial trans-

has to execute a deed as an agent, should take care that the deed and the covenants in it are expressed to be made not by him, but by the person intended to be bound. Thus, if A. is the principal and B. his agent, the deed and covenant should not be expressed to be made by B. for A., but by A.; and the execution in like manner should be expressed to be made by A. by this agent B. (*k*).

2. *Ordinary contracts not under seal.*

Ordinary simple contracts. — When a person enters into a contract as the agent of another, the name of that other may be either disclosed or not. If it is disclosed, the contract is

(*k*) *Combe's case*, 9 Co. 76 *b*; *Wilks v. Back*, 2 East, 141.

actions be valid and effectual without a seal, and within the power of a partner, the attempt to seal the same in behalf of the firm will not vitiate its legal effect as an unsealed instrument. *Parson's Partn.* (2d ed.) p. 191 n.m.; *Price v. Alexander*, 2 G. Greene, 427; *Lawrence v. Taylor*, 5 Hill, 107; *Sweetzer v. Mead*, 5 Mich. 107; *Tapley v. Butterfield*, 1 Met. 515; *Gibson v. Warden*, 14 Wall. 247. Another exception is made in favor of releases under seal and, query, of delegations of the power to release. *U.S. v. Astley*, 3 Wash. C. C. 508; *Morse v. Bellows*, 7 N. H. 549; s. c. 28 Am. Dec. 372; *Wells v. Evans*, 20 Wend. 251; *Perlberg v. Gorham*, 10 Cal. 120; *Gates v. Pollock*, 5 Jones L. 344 (N. C.); *McLane v. Sharpe*, 2 Harr. 481 (Del.).

That a statute has given to notes the force and character of sealed instruments does not limit the power of a partner to make a note. *Southard v. Steele*, 3 Mon. 435; *Montgomery v. Boone*, 2 B. Mon. 244.

By the constitution of one state, Arkansas, and by statutes in about ten others, and by the permission to use scrawls in about twenty others (see *Stimson's American Statute Law*, p. 197), the importance of this restriction upon the power of a partner to bind the firm is much lessened, as pointed out by the able author of the latest American work on partnership, Mr. Clement Bates. *Bates, Partn.* § 414. This is the more evident when we consider that the authority to single partner may be given by parol, and that in very many cases, where the instrument sealed without due authority cannot be sued upon, it can be used as evidence in *assumpsit*, or the creditor can have recourse to a bill in equity.

Where a contract was made with a partnership for building a dam, and was executed by one partner only under seal and without authority from his co-partner, and the work was duly performed and within the scope of the partnership business, Held that the supposed contract having no legal existence *assumpsit* would lie. *Van Deusen v. Blum*, 18 Pick. 229.

A writing under seal, executed by one partner in the name of the firm, is held admissible in an action of *assumpsit* to prove a promise by the firm if made on sufficient consideration. *Fagely v. Bellas*, 17 Penn. St. 67.

Where the borrowing partner, by mistake, alone executed a penal bond in the name of the firm for the money instead of a note, equity corrected the mistake and held all the partners bound for the debt. *Galt v. Calland*, 7 Leigh, 594; *Purviance v. Sutherland*, 2 Ohio St. 478; *Weaver v. Tapscott*, 9 Leigh, 424; *James v. Bostwick*, *Wright* (Ohio), 142.

treated as that of the principal and not as that of the agent (*l*); whilst if it is not disclosed, the contract is considered as that of the agent.² But in this last case, the person dealing with the agent can, when he discovers the undisclosed principal, hold him liable instead of the agent (*m*).³

* **Firm liable though not named.** — If, therefore, one [*178] partner only, enters into a written contract, the question whether the contract is confined to him, or whether it extends to him and his co-partners, cannot be determined simply by the terms of the contract.

Written contracts. — For supposing a contract to be entered into by one partner in his own name only, still if in fact he was acting as the agent of the firm, his co-partners will be in the position of undisclosed principals; and they may therefore be liable to be sued on the contract, although no allusion is made to them in it. This was expressly decided in the well-known case of *Beckham v. Drake* (*n*). There, Drake, Knight and Sturgey were in partnership as type-founders; but Drake was a secret partner. A written

(*l*) *Fairlie v. Fenton*, L. R. 5 Ex. 169; *Ex parte Hartop*, 12 Ves. 352; *Russell v. Reece*, 2 Car. & Kir. 669. But even in this case the contract may be so worded as to bind the agent. See *Paice v. Walker*, L. R. 5 Ex. 173; *Calder v. Dobell*, L. R. 6 C. P. 486.

(*m*) See *Paterson v. Gandasequi*, 15 East, 62; *Thompson v. Davenport*, 9 B. & C. 78; and the note to those

cases in 2 Smith, L. C. If a man contracts for "my principal," the principal, although undisclosed, and not the agent, is liable; unless there is some special custom rendering the agent personally liable. But if there be such a custom the agent will be liable, see *Fleet v. Murton*, L. R. 7 Q. B. 126.

(*n*) 9 M. & W. 79, and 11 M. & W. 315, overruling *Beckham v. Knight*, 4 Bing. N. C. 243.

² "If, from the nature and terms of the instrument, it clearly appears not only that the party is an agent, but that he means to bind his principal, and to act for him, and not to draw, accept or indorse the bill on his own account, that construction will be adopted, however inartificial may be the language, in furtherance of the actual intention of the instrument. But if the terms of the instrument are not thus explicit, although it may appear that the party is an agent, he will be deemed to have contracted in his personal capacity." Story, Agency, § 155; *Tippets v. Walker*, 4 Mass. 595; *Stackpole v. Arnold*, 11 Mass. 27; *Hastings v. Lovering*, 2 Pick. 214; *Draper v. Massachusetts Steam Heating Co.*, 5 Allen, 338; *White v. Skinner*, 13 John. 307; *Mills v. Hunt*, 20 Wend. 431; *Mellen v. Moore*, 68 Me. 390; *Hayes v. Brubaker*, 65 Ind. 27; *Graham v. Campbell*, 56 Ga. 258; *Blakeley v. Bennecke*, 59 Mo. 193; *Powers v. Briggs*, 79 Ill. 493; *Brown v. Parker*, 7 Allen, 337.

³ See *Lyon v. Williams*, 5 Gray, 557; *Chandler v. Coe*, 54 N. H. 561; *Carroll v. St. John's Catholic &c. Society*, 125 Mass. 565; *United States Bank v. Binney*, 5 Mason, 176; *Melledge v. Boston Iron Co.*, 5 Cush. 158.

agreement relative to the partnership business was entered into between the plaintiff and Knight and Sturgey, and for a breach of this agreement by them the action was brought. Drake's name did not appear in the agreement; he did not sign it; nor when the contract was made was he known to the plaintiff to be a partner. It was nevertheless held that all three partners were liable jointly for a breach of the agreement, inasmuch as the agreement itself was clearly entered into by the firm, and Drake, like any other undisclosed principal, was liable to be sued as soon as his position was discovered.

Parol contracts. — In conformity with the same principle, if one partner acting in fact for the firm, orders goods and they are supplied to him, the firm will be liable to pay for them, although no mention was made of his co-partners (*o*), and they were unknown to the seller of the goods (*p*). So, if A. in his own name only underwrites a policy of insurance, but the profit or loss arising from the transaction is to be divided between him and B., both A. and B. will be liable to the insured (*q*).

Liability of dormant partners. — These cases establish the important proposition, that dormant partners are liable [*179] for the debts of the firm, notwithstanding *their connection with the firm was unknown to its creditors when the debts were contracted.

One partner only liable, he only being dealt with. — On the other hand, if one partner only is dealt with, and the circumstances are such as to show that he was acting and was dealt with on his own account, *i.e.*, as a principal, and not as the agent of the firm, he alone is responsible (*r*).

Examples. — Thus, where persons work a coach in partnership, each having his own horses, and one of them orders fodder on his own account, he alone is liable for it (*s*). So, in the ordinary case of an agreement between an author and

(*o*) *City of Lond. Gas Lt. and Coke Co. v. Nicholls*, 2 Car. & P. 365; *Whitwell v. Perrin*, 4 C. B. N. S. 412.

(*p*) *Ruppell v. Roberts*, 4 Nev. & Man. 31; *Robinson v. Wilkinson*, 3 Price, 538; *Bottomley v. Nuttall*, 5 C. B. N. S. 122.

(*q*) *Brett v. Beckwith*, 3 Jur. N. S. 31, M. R.

(*r*) See in addition to the cases cited below, *Ex parte Eyre*, 1 Ph. 227.

(*s*) *Barton v. Hanson*, 2 Taunt. 49. Mr. Collyer treats this as an exception depending on particular custom, but this view is not correct. The law is the same in Scotland; see *Jardine v. McFarlane*, 3 Ross. L. C. on Com. Law, 575.

a publisher, to the effect that the publisher shall pay for the paper, printing, and other expenses of publication, and that after reimbursing himself and deducting a commission, the profits shall be divided equally, the author is not liable for the paper or printing which may have been supplied and executed for the publisher (*t*).

Form of written contracts.— With respect to contracts in writing it is to be observed that a contract or other instrument required by statute to be in writing and signed by the party to be charged, only binds those partners who actually sign it (*u*); but if signature by the party to be charged, or his agent, is sufficient, the signature of one partner, in the name or on behalf of the firm, will bind all the partners (*v*).

It is often a matter of difficulty to determine whether a particular contract is entered into by the firm through one of the partners or by that one partner only. There is nothing to prevent one person from entering into a contract *as a principal*, and yet for and on behalf of another (*x*); and when A. enters *into a contract for B., it may [*180] not be easy to say whether it is B. who contracts, or whether it is A. for B.'s benefit. And yet the true answer to this question determines whether B. is or is not liable on the contract. The cases on this subject relate principally to bills of exchange and promissory notes, to which it is now proposed to pass.

3. *Bills of exchange and promissory notes.*

Bills and notes.— Although an ordinary contract not under seal, entered into by an agent for an undisclosed principal, is binding on that principal when discovered, and he can be sued upon it, the same rule does not apply to bills of ex-

(*t*) See the Scotch case of *Venables v. Wood*, 3 Ross. L. C. on Com. Law, 529; *Wilson v. Whitehead*, 10 M. & W. 503; but see *Gardiner v. Childs*, 8 C. & P. 345, where the paper was supplied for the specific book.

(*u*) *Swift v. Jewsbury*, L. R. 9 Q. B. 301, reversing *Swift v. Winterbotham*, 8 Q. B. 244.

(*v*) See *Duncan v. Lowndes*, 3 Camp. 478. In *Ex parte Harding*, 12 Ch. D. 557, a letter of guarantee was so framed as to bind the firm

and also those who signed it separately.

(*x*) See, in addition to the cases cited hereafter, *Gadd v. Houghton*, 1 Ex. D. 357; *Hough v. Manzanos*, 4 Ex. D. 104; *Southwell v. Bowditch*, 1 C. P. D. 374; *Paice v. Walker*, L. R. 5 Ex. 173. See, also, *Kay v. Johnson*, 2 Hem. & M. 118, where an agreement for a lease entered into by directors was enforced against them individually. See, also, *Odell v. Cermack*, *infra*, p. 185.

change and promissory notes. For, subject to the qualification that the name of a firm is equivalent to the name of all the persons liable as partners in it (*y*), no person whose name is not on a bill or note is liable to be sued upon it (*z*). In order, therefore, that a bill or note may be binding on a firm, the name of the firm or the names of all its members must be upon it; and if the names of one or more of the partners only are upon it, the others will not be liable to be sued upon the instrument, whatever may be their liability as regards the consideration for which it may have been given (*a*).

(*a*) **Bills in name of firm.** — *First, as regards bills having the name of the firm upon them.* A bill drawn, indorsed, or accepted in the name of the firm is considered as bearing the names of *all* the persons who actually or ostensibly compose the firm at the time its name is put to the [*181] bill;¹ and consequently all those persons, *including as well dormant as *quasi*-partners, may be sued upon the bill (*b*).

Thus, where A. employed B. to carry on his business, and such business was carried on by B. for A. under the name of B. & Co., a bill accepted by B. in the name of B. & Co., for the purposes of the business, was held to be the acceptance

(*y*) 45 & 46 Viet. c. 61, § 23 (2); and *infra*, note (*b*) *et seq.*

(*z*) 1b. § 23; and *Lloyd v. Ashby*, 2 C. & P. 138; *Ducarry v. Gill*, 4 ib. 121; *Eastwood v. Bain*, 3 H. & N. 738.

(*a*) *Bottomley v. Nuttall*, 5 C. B. N. S. 122; *Miles' claim*, 9 Ch. 635. As to the difference between an acceptance in the form A. for B., and B. *per proc.* A., see *O'Reilly v. Richardson*, 17 Ir. Com. Law Rep. 74.

Bills may be made payable to the holder of an office for the time being, 45 & 46 Viet. c. 61, § 7 (2).

(*b*) 45 & 46 Viet. c. 61, § 23 (2). See, as to dormant partners, *Swan v. Steele*, 7 East, 210; *Wintle v. Crowther*, 1 Cr. & J. 316; and as to *quasi*-partners, *Gurney v. Evans*, 3 H. & N. 122. A clerk who affixes the name of the firm is not liable on the bill. *Wilson v. Barthrop*, 2 M. & W. 863.

¹ Where a partner drew a note in the name of the firm, payable to himself, and then indorsed it to a third person for a personal consideration, an action may be sustained by an innocent second indorsee, though the note was antedated, and the first indorsee knew it. *Smyth v. Strader*, 4 How. 404, 11 L. ed. 1031. In *Richardson v. French*, 4 Met. 517, a member of the partnership applied to the business of the firm, money belonging to an estate of which he was administrator, and gave a note in the name of the partnership, to a creditor of the estate of which he was administrator, to pay his claim against the estate, and the firm was held liable on the note, although the money was not in the hands of the firm when the note was given. See also *Foster v. Andrews*, 2 Penn. 160; *Freeman's National Bank v. Savery*, 127 Mass. 75.

of A.; although B. had positive instructions not to accept bills, and the holder of the bill, who was an indorsee for value, knew nothing of A. or B. or of the business (*c*).

Moreover, if two partners, A. & B., carry on business in the name of A., a bill accepted by B. in the name of A. for the purposes of the partnership will bind both partners, although addressed to A. at a place where he carries on a separate business (*d*).

Two firms with one name. — If there are two firms with one name, a person who is a member of both firms is liable to be sued on all bills bearing that name, and binding on either firm. But if a member of only one of the two firms is sued on the bill, his liability will depend first on the authority of the person giving the bill to use the name of the firm of which the defendant is a member; and, secondly, on whether the name of that firm has in fact been used. If both these questions are answered in the affirmative, he will be liable, but not otherwise.

Thus in *Swan v. Steele* (*e*) there were two firms of Wood & Payne, one a cotton firm, the other a grocer's firm. The defendant Steele was a partner in the cotton firm only. A bill was paid to the cotton firm for a debt due to it, and was made payable to its order. This bill was indorsed in the name of "Wood & Payne" by Steele's co-partners, for a debt owing to the plaintiff by the grocer's firm, to which Steele did not belong. Steele was nevertheless held liable on this bill, *the plaintiff being a *bonâ fide* [*182] holder for value, without notice that any fraud on Steele was being committed. In this case the bill was properly indorsed "Wood & Payne," and the only question was who constituted that firm. The bill could only have been indorsed by the cotton firm. Steele was a member of it, though he was not a member of the firm for whose debt his partners paid it away. Lord Ellenborough held Steele's liability too clear for argument: for Steele was a member of the indorsing firm, and his co-partners in that firm were guilty of a fraud on him, of which the plaintiffs had no notice.

(*c*) *Edmunds v. Bushell*, L. R. 1 Q. B. 97.

(*d*) *Stephens v. Reynolds*, 5 H. & N. 513, and at *Nisi Prius*, 1 Fos. & Fin. 739, and 2 *ib.* 147. N.B. — The

bill was drawn on Reynolds at Woolwich, not at Walworth, as stated in 1 Fos. & Fin. 740.

(*e*) 7 East, 210.

Name of firm same as that of individual.—Again, persons may carry on business in partnership in the name of one of themselves, and if they do, they expose themselves to serious liability. *Primâ facie* his acceptances will bind them, even although dishonestly given (*f*). At the same time if they can show that he gave the bills as his own and not as the bills of the firm, they will not be liable even to a *bonâ fide* holder for value.¹ This was decided by the Court of Appeal in *The Yorkshire Banking Co. v. Beatson* (*g*), in which the law on this subject will be found exhaustively examined. In that case an accommodation acceptance given by one partner in his own name was held not binding on his dormant partner, as the acceptance was not intended to bind him, and was, in truth, a private transaction, and was not entered in the books of the firm. The fact that the plaintiffs took the bill as the bill of the persons, whoever they were, who might be associated with the partner whose name was on the bill, was held immaterial. The plaintiffs never knew of or gave credit to any one else.

If A., B. & C. are partners, and A. draws a bill of exchange on B., and he accepts the bill, A., B. & C. cannot be sued upon it; and this is so whether A., B. & C. have a business name or not (*h*); and even although the bill may have been used for the joint benefit of the three partners (*i*). Even if it is agreed that the business of the three shall be [*183] carried on in the name *of one of them, it will not follow that all bills accepted by him will bind all the three partners. The question remains whose bill is it?

This was decided by the Court of Appeal in Chancery in Miles' claim (*j*). There four firms, F. & Co., M. & Co., M.

(*f*) See 5 C. P. D. 123 and 124.

(*g*) 5 C. P. D. 109, affirming s. c. 4 ib. 204, but on different grounds. N.B.—The court set aside the verdict of the jury. See, also, South

Carolina Bank v. Case, 8 B. & C. 427; *Ex parte* Law, 3 Deac. 541.

(*h*) See *Nicholson v. Ricketts*, 2 E. & E. 497, and Miles' claim, 9 Ch. 635.

(*i*) *Ibid*.

(*j*) 9 Ch. 635.

¹ Where business is carried on in the name of one of the partners, his signature to negotiable paper is presumptively his own act, and does not indicate that it was given on the partnership account. The holder is accordingly bound to show that the paper was given on partnership account. *Manufacturers' & Mechanics' Bank v. Winship*, 5 Pick. 11; *United States Bank v. Binney*, 5 Mason, 176; *Strauss v. Waldo*, 25 Ga. 641; *Oliphant v. Matthews*, 16 Barb. 608; *Burrough's Appeal*, 26 Penn. St. 264; *National Bank of Cheung v. Ingraham*, 58 Barb. 290; *Mercantile Bank v. Cox*, 38 Me. 500.

& L., and A. & Co., engaged in a joint adventure, and agreed to carry on business under the name of F. & Co., and to divide profits and losses in equal shares. They also agreed that funds for the adventure should be raised by the drafts of any one of the four firms on the others: bills were drawn by M. & Co. on A. & Co., on M. & L., and on F. & Co., and were duly accepted. It was held that none of these bills bound all four firms jointly. As regards the bills drawn on A. & Co., and on M. & L., the case presented no difficulty, for it is plain that these bills were not drawn or accepted in the name in which the joint adventure was carried on. As regards the bills accepted by F. & Co., which was the name under which the joint adventure was carried on, there was an ambiguity; but the court held that this name, used as it was, really meant the separate firm F. & Co., and not the four firms engaged in the adventure, and that there was no sufficient reason for holding it to mean anything else.

Again, in *Hall v. West* (*k*), three brothers of the name of Dawson carried on in partnership under the name of Dawson & Sons, the business of millers, farmers, coal and corn dealers, and bone crushers. The defendant was a dormant partner in the bone crushing business only. Dawson & Sons over-drew their account with their bankers, who knew nothing of West, nor of his connection with the bone business. Having, however, discovered this, they sued him for the amount of the overdrawn account. He was held not liable; for in point of fact the balance due to the bankers was not in respect of any debt contracted by Dawson & Sons in connection with the bone crushing business; it was not, therefore, as between the partners themselves a debt of the firm of which the defendant *was a member; and there [*184] was no apparent as distinguished from real authority on which the bankers could rely as against West.

In the same case bills were drawn by West on and accepted by Dawson & Sons. With one exception these bills were drawn for purposes unconnected with the bone business. On the facts stated (but which it is unnecessary here to detail) the court held that all these bills had in fact been paid: it became unnecessary, therefore, to consider whether

(*k*) A special case decided in the Exchequer, and afterwards in the Exchequer Chamber, in June, 1875. The above note of the case is taken from shorthand-writer's notes of the judgments.

West could have been sued as an acceptor. It was contended, on the authority of *Baker v. Charlton* (*l*), that he was liable; but the Court of Exchequer (*m*) dissented from that case and expressed a clear opinion that West could not have been liable as an acceptor of the bills, with the exception of the one which had been given for the purposes of the bone business in which he was a partner. The Court of Exchequer Chamber expressed no opinion on this point, it being unnecessary to do so.

(*b*) **Bills not in name of firm.**—*Secondly, as regards bills not drawn, accepted, or indorsed by the firm in proper form.* In the absence of evidence to the contrary, a partner has no authority to use for partnership purposes any other name than the name of the firm (*n*); and if he does, and there is any substantial variation which cannot be shown to be authorised by his co-partners, the firm will not be liable. If, however, there is no substantial variation, the firm will be bound.¹

In *Faith v. Richmond* (*o*), persons carrying on business in *partnership under the name of The Newcastle and Sunderland Wallsend Coal Company, were held not liable on a note issued in the name of The Newcastle Coal Company; and in *Kirk v. Blurton* (*p*), where,

(*l*) In *Baker v. Charlton*, Peake, 111 (ed. 3), two firms carried on business under the name of J. King & Co. The defendant was partner in one of them only, but his co-partners were members of both firms; the defendant was sued by an indorsee on a bill drawn by his co-partners in the name of "J. King & Co.;" the defendant resisted the action on the ground that the bill was not drawn by the firm to which he belonged, but by the other; but Lord Kenyon declared the defence invalid. Having traded with persons under the style of "J. King

& Co.," the defendant was liable on bills drawn by them in that name. See, also, *Davidson v. Robertson*, 3 Dow, 218; *McNaire v. Fleming*, 1 Mont. Part. 37, and 3 Dow, 229. But *Baker v. Charlton* cannot now be relied on.

(*m*) *i.e.* Kelly, C. B., and Amphlett, B.

(*n*) *Kirk v. Blurton*, 9 M. & W. 284; *Hambro' v. Itull and London Fire Insur. Co.*, 3 H. & N. 789.

(*o*) 11 A. & E. 339.

(*p*) 9 M. & W. 284. This case was decided on the right principle;

¹ "If a partner, intending to use the name of the firm, make a slight and unimportant variation in it, the firm is still bound; but not if the variation be material." 1 Pars. Notes & Bills, 135.

It was accordingly held in *Tilford v. Ramsey*, 37 Mo. 563, that the jury might well find that a note signed "Chas. G. Ramsey & Co.," by a member of the firm of "Charles G. Ramsey & Co.," was the note of the firm. See also *Drake v. Elwyn*, 1 Caines, 181; *Kendrick v. Tarbell*, 27 Vt. 512; *Darlington v. Garrett*, 14 Ill. Ap. 238.

two persons carried on business under the name of John Blurton, one of them was held not liable on a bill drawn and indorsed by the other in the name of John Blurton & Co.

On the other hand, in *Norton v. Seymour (q)*, where the name of the firm was *Seymour & Ayres*, a promissory note signed by one of the partners thus — “Thomas Seymour & Sarah Ayres,” was held to bind both.

Effect of frequent use of wrong name. — In the above cases of *Faith v. Richmond* and *Kirk v. Blurton*, the name used was not the name of the firm sought to be made liable, nor was there any evidence to show that the firm was in the habit of making use of the name in question. If there had been such evidence the firm would have been liable; for whatever the name used may be, if it is that ordinarily employed by a partner whose business it is to attend to the bills and notes of the firm, the other partners will not be heard to say that such name is not the name of the firm for the purpose for which he has habitually used it.

Therefore, where the name of a firm was *Hapgood & Co.*, but the managing partner was in the habit of indorsing bills of the firm in the name of *Hapgood & Fowler*, which had formerly been the name of the firm, it was held that such indorsement was valid, although the other partners were not shown to have authorised the use of the name in question (*r*).

Liability of persons using the wrong name. — Again, although in *Faith v. Richmond* and *Kirk v. Blurton*, the firm was held not bound, in consequence of the name of the firm not being used, those members of the firm who actually made use of the names in question were held liable; for the name used was made theirs by their own act (*s*). Upon the

but most persons will probably agree with *Martin, B.*, in thinking that the principle was not properly applied, and that it should have been left to the jury to say whether *John Blurton* and *John Blurton and Co.* did not in fact mean the same thing. See *per Martin, B.*, 5 H. & N. 517. In *Odell v. Cormack*, 19 Q. B. D. 223, a bill drawn on *Cormack Brothers* was accepted by *Carter* for *Margaret Cormack & Self*. *Carter* was not a partner with her, and had no authority to

accept bills for her either in her own name or in the name of the firm in which she carried on business, and she was held not liable on the bill.

(*q*) 3 C. B. 792.

(*r*) *Williamson v. Johnson*, 1 B. & C. 146.

(*s*) So in *Wild v. Keep*, 6 C. & P. 235, a person of the name of *Joseph Keep* was held liable on a bill accepted by himself in the name of *John Keep & Co.*

[*186] *same principle, if blank bills are drawn and indorsed by a firm, and before they are negotiated one partner dies and the name of the firm is changed by the surviving partners, and the bills previously drawn and indorsed are then negotiated; these bills will be binding on the new firm, although the name on the bills is that of the old firm and not that of the new (*t*).

Cases in which error in name is unimportant. — A bill drawn on a firm by a wrong name and accepted in its right name, binds the firm (*u*); and a bill drawn on a firm and accepted by one partner in his own name only, has been held to bind the firm on the ground that the word “accepted,” if written by one of the partners, is sufficient without any signature; and that his signature, if affixed, may be treated as redundant (*x*). But there is no other case in which a firm is liable on a negotiable instrument, made, drawn, or indorsed in the name of one of the partners only (*y*), unless indeed his name is the name of the firm (*z*).

Drawee and acceptor not identical. — Even a bill drawn on one partner and accepted by him on behalf of the firm does not bind the firm, the other partners not being drawees (*a*).

A bill drawn on a firm and accepted by one partner in the name of the firm and in his own name, does not bind him separately if the firm is bound by his acceptance (*b*). But if he has no authority to bind the firm he is himself liable on the bill. This was held in *Owen v. Van Uster* (*c*), where a bill was drawn on “*The Allty-Crib Mining Com-pany*,” and was *accepted “*per proc. The Allty-Crib Mining Company, W. T. Van Uster London Manager*.” It was held that Van Uster was personally liable on

(*t*) *Usher v. Danney*, 4 Camp. 97. If a change is made in a firm, and by a mistake a contract is entered into with it in its old name, the members of the new firm may sue on it, provided the other party is not prejudiced by their so doing, *Mitchell v. Lapage*, Holt, N. P. Ca. 253. But see *Boulton v. Jones*, 2 H. & N. 564.

(*u*) *Lloyd v. Ashby*, 2 B. & Ad. 23.

(*x*) *Mason v. Rumsey*, 1 Camp. 384; *Jenkins v. Morris*, 16 M. & W. 879; *Byles on Bills*, 43 and 45, ed. 11; p. 47 *et seq.*, ed. 14. In such a

case the acceptor may also be sued alone. See *infra*.

(*y*) *Emly v. Lye*, 15 East, 7; *Ex parte Bolitho*, Buck, 100; *Lloyd v. Ashby*, 2 C. & P. 138; *Williams v. Thomas*, 6 Esp. 18.

(*z*) As to which, see *ante*, pp. 182, 183.

(*a*) *Nicholls v. Diamond*, 9 Ex. 154; *Mare v. Charles*, 5 E. & B. 978.

(*b*) *Re Barnard*, 32 Ch. D. 447; *Malcolmson v. Malcolmson*, L. R. Ir. 1 Ch. D. 228.

(*c*) 10 C. B. 318. The company in this case was a mere partnership.

this bill, he being one of the company on which the bill was drawn, and therefore one of the drawees, and also an acceptor.

(c) **Promissory notes.**—*Thirdly, as regards promissory notes.* With respect to promissory notes the following rules are deducible from the cases :—

1. **Promise by one partner.**—If a partner promises for himself, and not for himself and co-partners, he only is liable on the note, though he may promise to pay a partnership debt (*d*).

2. **Promise by several partners.**—If several partners sign a note in this form, “I promise to pay,” all who sign the note are liable on it, jointly and severally (*e*).

3. **Promise by one in name of firm.**—If one partner promises in the name of the firm to pay that for which he and not the firm is liable, the promise binds him, at all events. As an illustration of this, reference may be made to *Shipton v. Thornton* (*f*). There the defendant, a partner in the house of Thornton and West, was solely liable to the plaintiff for certain freight, and he gave the plaintiff a note in this form :

I HEREBY engage to pay the amount of freight, &c.,

I am, &c.,

R. & R. THORNTON & WEST.

On this note the defendant was held separately liable.

4. **Joint and several notes.**—One partner has no authority, as such, to bind himself and co-partners jointly and severally (*g*). But if some members of a firm make a joint and *several* promissory note they will be personally liable, although they may have signed only on behalf of themselves and co-partners; and persons signing notes in the following forms have been held liable on them as *mak- [*188] ers, and not merely incidentally as members of the company to which they belonged.

(*d*) *Siffkin v. Walker*, 2 Camp. 308; *Murray v. Somerville*, 2 Camp. 99, note; and see *Ex parte Harris*, 1 Madd. 583.

(*e*) *Clarke v. Blackstock*, Holt, N. P. C. 474; *March v. Ward*, 1 Peake, 177 (ed. 3).

(*f*) 9 A. & E. 314. See, too, *Hudson v. Robinson*, 4 M. & S. 475.

(*g*) *MacLae v. Sutherland*, 3 E. & B. 1, which shows that a joint and several promissory note is valid as a joint note, though it is not binding, as a several note, on any person who does not sign it.

WE jointly and severally promise to pay, &c., value received, for and on behalf of the Wesleyan Newspaper Association.

PARKER STORY, }
JAMES WARE, } Directors (h).

WE, the directors of the Royal Bank of Australia, for ourselves and other shareholders of this company, jointly and severally promise to pay, &c., value received on account of the company.

T. W. SUTHERLAND, }
J. CONNELL, }
M. BOYD, } Directors (i).
A. DUFF, }

Midland Counties Building Society.

WE jointly and severally promise to pay, &c.

W. R. HEATH, }
S. B. SMITH, } Directors.
W. D. FISHER, Secretary (k).

5. **Promise for self and co-partners.** — If a partner promises for himself and co-partner, this amounts to a promise by the firm (l). Accordingly the firm has been held liable on notes in the following form : —

SIXTY days after sight I pay A. or order £200, value received.
For J. MATTHEW,
T. WHITSMITH,
T. SMITHSON,
J. MATTHEW (m);

and, contrary to an older decision (n), the firm has been held liable on notes in the form following : —

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** Leicester and Leicestershire Bank.*

I PROMISE to pay the bearer on demand £5, value received,
For JOHN CLARKE,
RICHARD MITCHELL,
JOSEPH PHILLIPS,
THOMAS SMITH,
RICHARD MITCHELL (o)

(h) *Healey v. Story*, 3 Ex. 3, in which Story and Ware were sued jointly.

(i) *Penkivil v. Connell*, 5 Ex. 381, in which Connell only was sued.

(k) *Bottomley v. Fisher*, 1 H. & C. 211, in which Fisher only was sued.

(l) *Smith v. Bailey*, 11 Mod. 401; *Lane v. Williams*, 2 Vern. 277 and

292; *Smith v. Jarves*, 2 Lord Raymond, 1484.

(m) *Galway v. Matthew*, 1 Camp. 403.

(n) *Hall v. Smith*, 1 B. & C. 407, where the form was "I promise to pay — for A. B., C. D., and E. F., signed A. B." and which was held to bind A. B. separately.

(o) *Ex parte Buckley*, 14 M. & W.

SECTION VI.—LIABILITY OF PARTNERSHIPS IN RESPECT OF CONTRACTS NOT BINDING ON THEM, BUT OF WHICH THEY HAVE HAD THE BENEFIT.

Effect of having had the benefit of a contract.—It is an erroneous but popular notion that if a firm obtains the benefit of a contract made with one of its partners, it must needs be bound by that contract. Now, although the circumstance that the firm obtains the benefit of a contract entered into by one of its members tends to show that he entered into the contract as the agent of the firm (*p*), such circumstance is no more than evidence that this was the case, and the question upon which the liability or non-liability of the firm upon a contract depends is not—Has the firm obtained the benefit of the contract? but—Did the firm, by one of its partners or otherwise, enter into the contract? (*q*).

A leading case on this head is *Emly v. Lye* (*r*). There a partner drew bills in his own name, and sent them to an agent of the firm in order that he might get them discounted. They were discounted, and the money obtained was remitted by the agent, and was paid to the account of the firm. It was held that the firm was neither liable for the amount of the bills on the bills themselves, nor for their proceeds on the common counts. There was no loan to the partnership; no contract with it: and no liability attached to the firm by the fact that the partner who alone was liable had applied the money after *he got it for the benefit of his co- [*190] partners as well as for the benefit of himself.

Again, in *Bevan v. Lewis* (*s*), one partner borrowed money, and executed warrants of attorney to confess judgment. The money which he obtained was applied by him for the benefit of the partnership, and was obtained in part with the knowledge of his co-partner, in order that it might be so applied. But it was held that the partnership was not liable for the money; the loan having been clearly made to the

469, and 1 Ph. 562; and *Ex parte Clarke*, De Gex, 153, reversing *Ex parte Christie*, 3 M. D. & D. 736.

(*p*) *Per Rolfe, B.*, in *Beckham v. Drake*, 9 M. & W. 99, 100.

(*q*) *Per Rolfe, B.*, *ubi supra*. See, too, *Kingsbridge Flour Mill Co. v. The Plymouth Grinding Co.*, 2 Ex.

718; *Ernest v. Nicholls*, 6 H. L. C. 423. Similarly, the fact that one partner only has obtained the benefit of a contract, does not show conclusively that the firm is not bound, *Ex parte Bonbonus*, 8 Ves. 544.

(*r*) 15 East, 7.

(*s*) 1 Sim. 376.

one partner against whom alone judgment was to be entered, and not to the firm through him.

Money borrowed by one partner. — So, in ordinary cases, when one partner borrows money without the authority of his co-partners, the contract of loan is with him and not with the firm; and the nature of that contract is not altered by his application of the money. The lender of the money has, therefore, no right to repayment by the firm, although the money may have been applied for its benefit (*t*), unless he can bring himself within the equitable doctrine referred to below.

Goods supplied to one partner. — The same rule applies to goods, services, and works supplied to or done for one partner, either on his own account, or if for the firm, at the request of one of its members acting beyond the limits of his apparent as well as of his real authority. The firm does not, in any case of this sort, enter into any contract, express or implied, with the person dealing with the partner in question, and does not incur any obligation towards that person by reason of the circumstance that it gets the benefit of what he has done (*u*). The principle of these decisions governs those cases in which one partner in

breach of trust, but without the knowledge or consent of his co-partners, *applies trust money over which he has control as a trustee, to the purposes of the firm. The fact that the firm has been benefited by the money in question does not necessarily render it liable to the owners of the money (*x*).

Equitable doctrine in these cases. — Where, however, money borrowed by one partner in the name of the firm but without the authority of his co-partners has been applied in paying off debts of the firm, the lender is entitled in equity to

(*t*) See *Smith v. Craven*, 1 Cr. & J. 500; *Hawtayne v. Bourne*, 7 M. & W. 595; *Burmester v. Norris*, 6 Ex. 796; *Ricketts v. Bennett*, 4 C. B. 686; *The Worcester Corn Exchange Co.*, 3 De G. M. & G. 180; *Fisher v. Tayler*, 2 Ha. 218. In all these cases the firm got the benefit of the money borrowed, and yet was held not liable to repay it.

(*u*) See, in addition to the cases already cited, *Kingsbridge Flour Mill*

Co. v. Plymouth Grinding Co., 2 Ex. 718; *Lloyd v. Freshfield*, 2 Car. & P. 325, and 9 Dowl. & R. 19; *Galway v. Matthew*, 10 East, 264; *Kilgour v. Finlyson*, 1 H. Blacks. 155; *Ex parte Wheatly*, *Cooke's Bank. Law*, 534, ed. 8; *Ball v. Lanesborough*, 5 Bro. P. C. 480; *Ex parte Peele*, 6 Ves. 603, 604; *Ex parte Hartop*, 12 ib. 352.

(*x*) *Ex parte Apsey*, 3 Bro. C. C. 265; *Ex parte Heaton*, Buck, 386. See *ante*, p. 160.

repayment by the firm of the amount which he can show to have been so applied: and the same rule extends to money *bonâ fide* borrowed and applied for any other legitimate purpose of the firm (*y*). This doctrine is founded partly on the right of the lender to stand in equity in the place of those creditors of the firm whose claims have been paid off by his money; and partly on the right of the borrowing partner to be indemnified by the firm against liabilities *bonâ fide* incurred by him for the legitimate purpose of relieving the firm from its debts or of carrying on its business (*z*). The equitable doctrine in question is limited in its application to cases falling under one or other of the principles above indicated (*a*).

(*y*) The leading cases on this subject are *Ex parte Chippendale* (The German Mining Co.'s case), 4 De G. M. & G. 19; *The Cork and Youghal Rail. Co.*, L. R. 4 Ch. 748; *Blackburn Building Soc. v. Cunliffe, Brooks & Co.*, 22 Ch. D. 61, and 9 App. Ca. 857, and 29 Ch. D. 902; *Baroness Wenlock v. River Dee Co.*, 19 Q. B. D. 155. The case of infants is analogous: an infant is liable for necessities; but he was not liable at law for money lent, though applied in the purchase of necessities. *Darby v. Boucher*, 1 Salk. 279. But otherwise in equity, *Marlow v. Pitfield*, 1 P. W. 558. So, a husband was not at law liable for money lent to his wife to enable her to obtain necessities, and

applied by her for that purpose. *Knox v. Bushell*, 3 C. B. N. S. 334. But see in equity, *Jenner v. Morris*, 1 Dr. and Sm. 218, and 3 De G. F. & J. 45; *Deare v. Soutten*, 9 Eq. 151; and observe that in the last case the plaintiff had no ground for suing in equity except his inability to recover at law. See, also, *Baroness Wenlock v. River Dee Co.*, 36 Ch. D. 674, under appeal.

(*z*) See *infra*, book iii. c. 6, § 3, p. 381 *et seq.*

(*a*) See, in addition to the cases cited in note (*y*), *National Permanent Benefit Building Soc.*, 5 Ch. 309; *Magdalena Steam Nav. Co.*, *Johns*. 690; *Athenæum Life Ins. Soc. v. Pooley*, 3 De G. & J. 294.

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* CHAPTER II.

OF THE NATURE, EXTENT, AND DURATION OF THE LIABILITY OF INDIVIDUAL MEMBERS OF PARTNERSHIPS TO CREDITORS.

Nature and extent of a partner's liability.—Having examined in the preceding pages the liabilities of a firm for the acts of its members, it is proposed in the present chapter to investigate the liability of the individual partners in respect of such obligations as upon the principles already discussed are binding on them all.

SECTION I.—NATURE OF THE LIABILITY.

1. *As regards contracts.*

No several liability on contracts binding the firm.—An agent who contracts for a known principal, is not liable to be himself sued on the contract into which he has avowedly entered only as agent. Consequently, a partner who enters into a contract on behalf of his firm, is not liable on that contract except as one of the firm: in other words, the contract is not binding on him separately, but only on him and his co-partners jointly (*a*).¹ One partner may render himself separately liable by holding himself out as the only member of the firm (*b*); or by so framing the contract, as to bind

(*a*) See *Ex parte Buckley*, 14 M. & W. 469; *Re Clarke, De Gex*, 153; *Ex parte Wilson*, 3 M. D. & D. 57.

(*b*) *Bonfield v. Smith*, 12 M. & W. 405; *De Mautort v. Saunders*, 1 B. & Ad. 398.

¹ Partnership contracts are joint in law, and this seems to follow from the nature of the partner's power as agent to contract for the firm but not for each partner severally. *Thornton v. Bussey*, 27 Ga. 302; *Sager v. Tupper*, 38 Mich. 258; *Crosby v. Jeroloman*, 37 Ind. 264; *Mason v. Eldred*, 6 Wall. 231, 18 L. ed. 783; *Scott v. Colmesnill*, 7 J. J. Mar. 416; *Halliday v. McDougal*, 20 Wend. 81; s. c. 22 Wend. 264; *Irby v. Graham*, 46 Miss. 425; *Washburn v. Goodman*, 17 Pick. 519; *Marvin v. Wilber*, 52 N. Y. 270; *Balliet v. Fink*, 28 Penn. St. 266; *Davis v. Willis*, 47 Tex. 154; *Harrison v. McCormick*, 69 Cal. 616; *Bowen v. Crow*, 16 Neb. 556; *Washburn v. Bank of Bellows Falls*,

himself separately from his co-partners as well as jointly with them (*c*); but unless there are some special circumstances of this sort, a contract which is binding on the firm is binding on all (*d*) * the partners jointly and on none [*193] of them severally. There is no difference in this respect between law and equity (*e*) except that which arises from the equitable jurisdiction to rectify mistakes, and from

(*c*) See *ante*, p. 179 *et seq.*, and *Ex parte Harding*, 12 Ch. D. 557; *Higgins v. Senior*, 8 M. & W. 834; *Ex parte Wilson*, 3 M. D. & D. 57.

ners. Beckham v. Drake, 9 M. & W. 79; *Brett v. Beckwith*, 3 Jur. N. S. 31, M. R.

(*d*) Not excluding dormant part-

(*e*) *Kendall v. Hamilton*, 4 App. Ca. 504, and 3 C. P. D. 403.

19 Vt. 278; *Woodworth v. Spafford*, 2 McLean, 168; *Barry v. Foyles*, 1 Pet. 311.

T. and I. were partners as "T. & I." in business in New York, and the same with C. and A. were partners as "T. A. & Co." in same place. A.'s share was $\frac{3}{12}$, C.'s share was $\frac{4}{12}$, and T. & I.'s share was $\frac{5}{12}$. January 16, 1879, plaintiffs had judgment against T. & I. for \$800, and early next day placed the execution in hands of sheriff. Later on, same day, Jane I. issued an execution to the sheriff on a judgment for \$7000 against T. A. & Co. The sheriff, under these executions, levied on the personal property of T. & I., and advertised the same for sale. The plaintiffs having a further claim, not then in judgment, for goods sold to T. & I., notified the sheriff January 23, 1880, that they claimed as creditors of T. & I. the application of the firm property to the payment of firm debts and forbade any sale of the firm assets under Jane I.'s execution against T. A. & Co. February 7, 1880, the sheriff, after selling enough of the firm property to satisfy the execution then in his hands against T. & I., sold on the execution against T. A. & Co. "the right, title, and interest of T. & I., or either of them," in the property.

February 17, 1880, the plaintiffs recovered judgment against T. & I. on their second claim, and execution thereon was issued to the same sheriff, same day, and their attorney wrote the sheriff to levy on any of the assets of T. & I. of which he had only sold the interest of T. individually and I. individually, under Jane I.'s execution against T. A. & Co. The sheriff returned this second execution of the plaintiffs unsatisfied, and the plaintiffs brought their action complaining of a false return. The court below held that the sale under Jane I.'s execution simply operated as a sale of the separate interests of T. and I. in the firm property of T. & I., and not as a sale of the *corpus* of the firm property. This decision was based, as the court finds, improperly upon the decision in *Menagh v. Whitwell*, 52 N. Y. 146; s. c. 11 Am. Rep. 683. It is entirely clear that T. & I. could have taken their firm property and applied it to this joint judgment against them; and inasmuch as they had the power and right to do that they could have turned it out to the sheriff when he came with the joint execution against them (as members of T. A. & Co.), and as they could have turned it out upon the debt before judgment, or upon the execution after judgment, there can be no reason to doubt that the sheriff could take and sell it upon the execution free from the claim of their firm creditors. *Saunders v. Reilly*, 105 N. Y. 12; s. c. 50 Am. Rep. 472, citing *Ransom v. Vandeventer*, 41 Barb. 307; *Wilson v. Robertson*, 21 N. Y. 587; *Stanton v. Westover*, 101 N. Y., 265; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46; s. c. 49 Am. Dec. 160; *Case v. Beauregard*, 99 U. S. 119; *Fitzpatrick v. Flanagan*, 106 id. 648.

the principles adopted by courts of equity in administering the estates of deceased partners (*f*). These principles will be investigated at a later period in Book iv. ch. 3.

Partnership debts not several as well as joint. — It has often been said that in equity partnership debts are separate as well as joint; but this proposition is inaccurate and misleading.¹ It is true that a creditor of a partnership can obtain

(*f*) *Ib.*, where the whole law on this subject will be found carefully examined.

¹ In equity all partnership debts are deemed to be joint and several, so far at least as to enable a creditor to reach the assets of a deceased partner.

This was formerly limited to cases where the surviving partners were at the time, or had subsequently become bankrupt, or the sheriff had been unable to find the property out of which to satisfy the executors. *Pope v. Cole*, 55 N. Y. 124; *Kohler v. Matlage*, 72 id. 259; *Chittenango Bank v. Morgan*, 73 id. 593; *Troy Iron & Nail Co. v. Winslow*, 11 Blatchf. 513; *Lawrence v. Trustees*, 2 Den. 577; s. c. 11 Paige, 80; *Pullen v. Whitfield*, 55 Ga. 174; *Offutt v. Scott*, 47 Ala. 104; *Patterson v. Brewster*, 4 Edw. Ch. 352; *Yates v. Hoffman*, 5 Hun, 113.

Except so far as relates to the remedy, the distinction between the joint and several liability of partners is substantially obsolete, and in twenty-eight states and territories, joint debts are made joint and several by statute, *Stimson's Amer. Stat. Law*, § 4113; and in many the English rule as laid down in *Devaynes v. Noble*, 1 Mer. 529, has been fully adopted by the courts. *Bryant v. Hawkins*, 47 Mo. 410; *Haralson v. Campbell*, 63 Ala. 278; *Pearce v. Shorter*, 50 id. 318; *Hall v. Cook*, 69 id. 87; *Kent v. Walker*, 21 Ark. 411; *Williams v. Rogers*, 14 Bush, 76; *Miller v. Northern Bank*, 34 Miss. 412; *Logan v. Wells*, 76 N. C. 416; *Williams v. Mutterbaugh*, 29 Kan. 730; *Simpson v. Schulte*, 21 Mo. App. 639; *Gratz v. Stump*, *Cooke (Tenn.)* 493; *Amis v. Smith*, 16 Pet. 503, 10 L. ed. 973.

In *Mason v. Tiffany*, 45 Ill. 392, which was a proceeding in chancery by a creditor of a firm, to enforce payment of a firm debt against T., a deceased member of the firm, it was held that every partnership debt being joint and several, it follows necessarily that resort may be had in the first instance for the debt to the surviving partner or to the assets of the deceased partner.

This was followed in *Silverman v. Chase*, 90 Ill. 37. See supposed *contra*, *Moline Water Power Co. v. Webster*, 26 Ill. 233; *Pahlman v. Graves*, id. 405. See *Story*, Partn. § 362. See *Id.*, Eq. Jur. § 676; *Collyer*, Partn. § 580; *Dixon*, Partn. 113; *Nelson v. Hill*, 5 How. 127; *Lewis v. U. S.*, 92 U. S. 622; *Camp v. Grant*, 21 Conn. 41; *Weyer v. Thornburgh*, 15 Ind. 124; *Dean v. Phillips*, 17 id. 406; *Hardy v. Overman*, 36 id. 549; *Freeman v. Stuart*, 41 Miss. 141; *Irby v. Graham*, 46 id. 425; *Saunders v. Wilder*, 2 Head. 579; *McLain v. Carson*, 4 Ark. 465; *Wisham v. Lippincott*, 1 Stockt. Eq. 353; *Travis v. Tartt*, 8 Ala. 574; *Fillyau v. Laverty*, 3 Fla. 72; *Gant v. Reed*, 24 Tex. 46; *Bowker v. Smith*, 48 N. H. 111; *Doggett v. Dill*, 108 Ill. 565; s. c. 48 Am. Rep. 565. In this last case, Walker, Judge, dissents if the doctrine is to be extended to cases where there are individual creditors of the deceased partner.

And a different rule would seem to prevail in New York, Georgia, Wisconsin, and some other states. *Lawrence v. Trustees*, 11 Paige, 80; *Voorhis v. Childs*, 17 N. Y. 354; *Bennett v. Woolfolk*, 15 Ga. 213; *Sherman v. Kreul*, 42 Wis. 33.

payment of his debt out of the estate of a deceased partner (*g*); but the judgment which such a creditor obtains is quite different from that which a separate creditor is entitled to (*h*); and it is a mistake to say that the joint creditor of the firm is also in equity a separate creditor of the deceased partner (*i*). In Bankruptcy the joint debts of a firm are never treated as joint and several; and yet in Bankruptcy equitable as well as legal principles are always recognised.

In *Kendall v. Hamilton* (*k*) two out of three partners were sued for a partnership debt, and judgment was recovered against them. Afterwards the plaintiffs having discovered that the defendant Hamilton was a member of the firm, sued him for the same debt which was still unsatisfied. But it was held that the action could not be maintained; for the liability of Hamilton was a joint liability only, and the judgment obtained against his co-partners was a bar to another action against him.

(*g*) See the next note. *Hoare v. Contencin*, 1 Bro. C. C. 27, shows that this was not always the case.

(*h*) See *Re Barnard*, 32 Ch. D. 447; *Hills v. M'Rae*, 9 Ha. 297; *Re Hodgson*, 31 Ch. D. 177; *Re McCrae*, 25 ib. 16 and *post*, book iv. c. 3.

(*i*) Except in partnership cases the liability in equity on a joint contract is the same as at law; *Other v. Iveson*, 3 Drew. 177; *Jones v. Beach*, 2 De G. M. & G. 886; *Rawstone v. Parr*, 3 Russ. 539.

(*k*) 4 App. Ca. 504, and 3 C. P. D. 403. This case arose after the Jud. Acts came into operation, and decided two points, viz., 1, that ordinary partnership debts are not joint and several; 2, that a judgment by a joint creditor of a firm against one partner in an action brought against him only, discharges his co-partners, although the judgment is unsatisfied and although the co-partners were unknown to the creditor when he recovered judgment. This last rule, although now settled to be law, rests on technical reasoning, and if not carefully limited in its application will lead to unexpected and unjust results. In *Cambefort v. Chapman*, 19 Q. B. D. 229, the rule was, however, extended very considerably. In

that case the facts were as follows: *Wilson & Chapman* carried on business under the name of *Wilson & Co.*, and became indebted to the plaintiff for goods sold and delivered. The plaintiff only knew *Wilson & Chapman* was a dormant partner. *Wilson & Chapman* dissolved partnership, but the plaintiff was ignorant of this. After the dissolution the plaintiff drew a bill on *Wilson & Co.*, and *Wilson* accepted it in that name. The bill was given for the partnership debt, and was dishonoured. The plaintiff sued *Wilson & Co.* on the bill and obtained judgment against *Wilson & Co.*, but could not get payment from *Wilson*. The plaintiff afterwards sued *Chapman* for the goods; but it was held that the bill having been given for the goods, and not as a collateral security only (as to which, see p. 256, note (*c*), and p. 704, notes (*d*) to (*h*)), the action on the bill was in substance an action against *Wilson* for the goods, and that the judgment against him, although unsatisfied, afforded *Chapman* a good defence to the action against him. Observe that the bill did not bind him, nor did the judgment. But *quare* whether *Kendall v. Hamilton* applies to such a case?

Effect of judgment against some partners.— This case would have presented no difficulty before the passing of the Judicature Acts; but it was contended that Hamilton's liability was in equity several as well as joint, and that since the passing of the Judicature Acts he could be sued [*194] *notwithstanding the judgment recovered against his co-partners. This construction, however, was decided to be unsound, and it did not prevail. Before the passing of the Judicature Acts the Court of Chancery would have had no jurisdiction in such a case as *Kendall v. Hamilton*, and there were no circumstances importing equitable considerations into it.

Effect of judgment against surviving partners.— It must not, however, be inferred from *Kendall v. Hamilton* that if a creditor of a firm sues the surviving partners and recovers judgment against them he cannot obtain payment of his demand out of the assets of a deceased member of the firm. The contrary is well established by a long series of cases which are in no way affected by *Kendall v. Hamilton*.

Equitable doctrine illustrated.— It has long been held that a creditor of the firm is himself entitled to obtain payment from the estate of the deceased, even although he may have taken as a security for his debt a bond or covenant binding the partners jointly (*l*).

Thus, in *Bishop v. Church (m)*, two partners borrowed 2000*l.*, for which they afterwards gave their joint bond. One of them then died, and the other became bankrupt. A bill was filed by the creditor for payment of the bond out of the estate of the deceased partner; and it was held that his estate continued liable notwithstanding that it was discharged at law, the bond being joint and not joint and several. In this case, it was also held that the bond ought to be treated as joint and several so as to make the estate of the deceased partner liable as for a specialty debt and not as for

(*l*) See, in addition to the cases cited in the next few notes, *Primrose v. Bromley*, 1 Atk. 90; *Darwent v. Walton*, 2 Atk. 510; *Lane v. Williams*, 2 Vern. 292; and see *Sleech's* case, 1 Mer. 539; *Devaynes v. Noble*, 2 R. & M. 495, and the cases there commented on; *Smith v. Smith*, 3

Giff. 263. The cases only relate to mercantile partnerships, but, *quere* if there is any difference in this respect between them and other partnerships.

(*m*) 2 Ves. S. 100 and 371. *Simpson v. Vaughn*, 2 Atk. 31, is a very similar case.

a simple contract debt, as would have been the case without the bond (*n*).

In *Beresford v. Browning* (*o*), four partners agreed that on the death of any of them the survivors should not be bound to *pay out his capital at once, but should pay [*195] it by certain instalments, as ascertained at the last preceding stock-taking. The agreement did not purport to bind the survivors jointly and severally. But it was held that, even if they were at law bound only jointly, they were liable in equity severally as well as jointly; and that the executor of the partner first dying was entitled to be paid the amount due to him out of the estate of a surviving partner, who had himself died, and was not restricted to suing the ultimate surviving partner.

Effect of judgment. — Nor, if the creditor sues the surviving partners and obtains judgment against them, he will be therefore precluded from proceeding to enforce his original claim against the estate of the deceased partner (*p*). In the case here supposed the judgment does not affect his estate. So, if the creditor of the firm first seeks payment out of the estate of a deceased partner, he is not precluded from afterwards suing the surviving partner (*q*).

Effect of rule on creditors inter se. — The doctrine acted on in *Bishop v. Church* and other cases of the same sort, is applied not only for the benefit of creditors against the partners and their representatives, but also as between competing creditors. This was settled in *Burn v. Burn* (*r*). In that case, partners being indebted to a large amount, gave to their creditor a joint bond; one of the partners died; the others afterwards became insolvent; and a bill was filed by the bond creditor for payment out of the estate of the deceased partner. Two questions then arose between the plaintiff and the simple contract creditors of the deceased partner, viz., first, whether the plaintiff could rank as a creditor at all against the assets of the deceased? and, sec-

(*n*) The following cases are to the same effect as *Bishop v. Church*, viz., *Simpson v. Vaughn*, 2 Atk. 31; *Thomas v. Frazer*, 3 Ves. 399; *Burn v. Burn*, ib. 573; *Orr v. Chase*, 1 Mer. 729, Appendix.

(*o*) 20 Eq. 564, and 1 Ch. D. 30.

(*p*) *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24; *Jacomb v. Harwood*, 2 Ves. Sen. 265.

(*q*) *Re Hodgson*, 31 Ch. D. 177.

(*r*) 3 Ves. 573, and see *Simms v. Barry*, there cited.

only, whether, if he could, he should rank as a specialty or only as a simple contract creditor? The Court decided both questions in favour of the plaintiff, and held that he was entitled to rank as a specialty creditor, although the consequence was, that after satisfying his demand, little remained for payment of the other creditors.

[*196] *Cases where the equitable and legal liabilities are the same. — But even in administering the estate of a deceased partner it must not be supposed that every joint debt contracted by the firm is payable out of his assets. It is a question of intention on the part of the firm and on the part of those with whom it deals. If, therefore, partners enter into a contract binding themselves jointly and not severally, and if such contract is not a mere security for the payment of a debt, or for the performance of a joint and several obligation, and if it has not been made joint in form by mistake, the effect of the contract will be in equity as in law to impose a joint obligation and no other (s).¹

A leading case on this head is *Sumner v. Powell* (t). There one of a firm of partners died, the firm being at the time of his death liable for a breach of trust committed by one of its members. A new partner was admitted into the firm, and a deed was executed between the executors of the deceased partner and the surviving partners and the new partner, whereby, in consideration of certain payments by the executors and of a release by them of all demands, the surviving partners and the new partner covenanted *jointly* to indemnify the executors from the debts and liabilities of the old firm. A suit was afterwards instituted in respect of the breach of trust, and the executors were ordered to make good the same out of the assets of their testator. The executors then filed a bill to be indemnified out of the estate of the new partner, and contended that the covenant into which he had entered, though joint in form, ought to be considered as joint and several. But it was held otherwise, for

(s) See, in addition to the cases noticed in the text, *Richardson v. Iveson*, 3 Drew. 177; *Rawstone v. Parr*, 3 Russ. 424, 539.
Horton, 6 Beav. 185; *Jones v. Beach*, (t) 2 Mer. 30, affirmed on appeal,
 2 De G. M. & G. 886; *Other v. T. & R.* 423.

¹ When a firm of two or more indorse in firm's name, their liability as sureties is joint, and not the several liability of each partner. *Clipperton v. Spettigue*, 15 Ont. Chy. 269.

the obligation of the new partner to indemnify the plaintiffs existed only by virtue of his covenant, and the extent of the obligation could therefore be measured only by the words of such covenant.

Again, in *Clarke v. Bickers (u)*, a lease was made to two partners jointly, of lands wanted by them for partnership purposes. The demise and lessees' covenants were all joint. * After the death of one of the partners his [*197] executors were sued in equity in respect of various breaches of covenant, and it was contended that the covenants ought to be treated as joint and several. But it was held on demurrer that no equity arose to the lessor from the fact that the lessees were co-partners; the lessor determined for himself how his leases should be granted. The demurrer was consequently allowed.

The same doctrine was acted on and even carried further in *Wilmer v. Currey (x)*. In that case three partners dissolved partnership, one of them, the plaintiff, retiring. By a deed made between the three partners, the plaintiff assigned all his share and interest to the other two, and they *jointly* covenanted to pay the debts of the firm, and to indemnify the plaintiff therefrom, and to pay the plaintiff certain sums of money. One of the two continuing partners having died, and the covenants not having been performed, the plaintiff filed his bill against the surviving partner and the executors of the deceased partner in order to obtain the sums remaining due to him, and to have the unliquidated partnership debts paid. But it was held on demurrer that the plaintiff had no equity against the estate of the deceased partner; *for although that partner was, irrespectively of the deed, liable to contribute towards payment of the partnership debts*, that was different from the obligation which arose by virtue of the covenant of which the plaintiff sought the benefit. It is, however, difficult to reconcile this case with *Beresford v. Browning (y)*.

Joint liability in cases of holding out.—A creditor who alleges that A., B., and C. are his debtors can, it is apprehended, prove his case by showing that one of them contracted on behalf of all three, and that the other two are

(u) 14 Sim. 639.

(x) 2 De G. & Sm. 347.

(y) The Court of Appeal, however, thought the two might be distinguished. See 1 Ch. D. 30.

estopped from denying his authority to do so. Cases in which persons have been held jointly liable on this principle are to be found in the books (z). The case of *Searf v. Jardine* (a), which seems at first sight to throw some doubt on this doctrine, is really not opposed to it. In that case S. & R. carried on business in partnership under the name of R. & [*198] Co. *S. retired. R. continued the business in the old name, and took another person into partnership with him. J. was a customer of the old firm; he had no notice of S.'s retirement, and he continued to deal with and became a creditor of the new firm. J. then was made acquainted with the fact that S. had retired; but J. nevertheless sued the new firm for their debt to him, and on their bankruptcy he proved against their estate. He then sought to recover the same debt against S.; but it was decided that S. was not liable. It was held that J. had the option of suing the new firm or S., but that J. could not sue the new firm and S. jointly; and that having elected to sue the new firm, he could not afterwards sue S., who was not in fact a member of it. The importance of this case turns on the grounds on which it was held that J. could not have sued S. jointly with the members of the new firm. The reason why he could not have done so was that J. did not in fact contract with the new firm upon the faith that S. was a member of it (b). If it had been proved that J. had so contracted he could, it is apprehended, have sued S. and the other members of the new firm, and have proved S. to have been a partner by estoppel.

2. As regards torts and frauds.

Torts create joint and several liabilities. — For torts imputable to a firm all the partners are liable jointly and severally (d).¹ To this general rule an exception occurs where

(z) *Waugh v. Carver*, 1 H. Bl. 235, Selborne, and 357-8, *per* Lord Blackburne, and other cases of holding out, *ante*, p. 40 *et seq.*

(a) 7 App. Ca. 345.

(b) See 7 App. Ca. 350, *per* Lord

(d) *Mitchell v. Tarbutt*, 5 T. R. 649; 1 Wms. Saund. 291 *f*, and *g*; Com. Dig. Abatement, F. 8.

¹ *White v. Smith*, 12 Rich. L. 595; *Howe v. Shaw*, 56 Me. 291; *Head v. Goodwin*, 37 id. 181; *McCrillis v. Hawes*, 38 id. 566; *Wood v. Luscomb*, 23 Wis. 287; *Brewing v. Berryman*, 15 N. B. 515; *Strang v. Bradner*, 114 U. S. 555, 29 L. ed. 248; *Stockwell v. United States*, 13 Wall. 53, 20 L. ed. 491; *Hammond v. Heward*, 11 Ont. C. P. 261; *Id.*, 20 Ont. Q. B. 36; *Re Zinke*,

an action *ex delicto* is brought against several persons in respect of their ownership in land, for then they are liable jointly, and not jointly and severally (*e*).

Distinction between torts and breaches of contract.—Although for general purposes it may be convenient to distribute acts and forbearances which give rise to obligations under the heads breach of contract and tort, it would not be difficult to show the impossibility of always distinguishing between the two (*f*). And yet if a breach of a contract binding

* on the firm imposes a joint liability only on its living [*199] members (as to which see *ante*, pp. 192, 193), whilst

a tort imputable to the firm imposes a joint and several liability, the importance of being able accurately to distinguish between a breach of contract and a tort becomes apparent. The difficulty, however, of doing so is increased by the doctrine that there are cases in which the same breach of an obligation may be regarded from two different points of view; and may at the option of the person injured, be made the foundation either of an action *ex contractu* or of an action *ex delicto* (*g*). Suppose, for example, that property is entrusted to a firm of bankers for the purpose of sale and investment, and that some member of the banking firm misapplies the property so entrusted. This breach of duty is a breach of the contract which was tacitly, if not expressly, entered into by the bankers when they received the property. But the misapplication of the property is a wrong independently of any contract; amounting in effect to a conversion or destruction of that which belonged to the customer.

Breaches of trust impose joint and several liabilities.—In equity the misapplication of the money is a breach of trust and imposes a joint and several liability on all the partners; on the ground that each partner is bound to see to the proper

(*e*) See 1 Wms. Saund. 291 *f*, and *g*.

(*f*) See Pollock on Torts, ch. 13.

(*g*) See on this subject, *Brown v. Boorman*, 11 Cl. & Fin. 1, and the

cases there referred to. See, also, *Bryant v. Herbert*, 3 C. P. D. 389; *Fleming v. Manchester, Sheffield, and Lincolnshire Rail. Co.*, 4 Q. B. D. 81.

Ex parte Hutchinson, "Argus" Reports, April, 1869 (Victoria); *Re McCaughey*, Solr., 3 Ontario R., 425.

A plea that the goods were lost by the barratry of the master, instigated by one of the part-owners, was demurred to on the ground that one part-owner could not by his fraud bind his co-owner; *Demurrer overruled. Moore v. Graham*, "Argus" Reports, Dec. 25, 1868 (Victoria).

application of what is entrusted to the firm (*h*). In such cases as these, the several liability of each partner to the creditors of the firm is not affected by the circumstance that the act imposing such liability was done by one only of the members of the firm without the knowledge or consent and in fraud of the others. If the act in question imposes a liability which upon the principles of agency can be imputed to the firm, each member thereof is in equity severally liable for such act, just as much as if there had been no fraud in the case (*i*); and it is well established in equity that a [*200] breach of trust which is imputable to several *persons, imposes upon them a liability which is both joint and several (*k*).

The effect of the Judicature Acts on this subject has not yet been judicially determined; but probably breaches of contract which are also breaches of trust will be held to impose several as well as joint liabilities both at law and in equity. In *Ex parte Adamson* (*l*) a partnership debt contracted by fraud was held to be joint and several, and to be provable in Bankruptcy against the joint estate of the firm or against the separate estates of its members at the option of the creditor.

SECTION II.—EXTENT OF LIABILITY.

Extent of partner's liability at common law.—By the common law of this country, every member of an ordinary partnership is liable to the utmost farthing of his property for the debts and engagements of the firm. The law, ignoring the firm as anything distinct from the persons composing it, treats the debts and engagements of the firm as the debts and

(*h*) See *Re Oxford Benefit Building Soc.*, 35 Ch. D. 502; *Ex parte Adamson*, 8 Ch. D. 807; and *ante*, p. 161, note (*f*).

(*i*) See *Ex parte Adamson*, 8 Ch. D. 807; *Vulliamy v. Noble*, 3 Mer. 619; *Clayton's case*, 1 Mer. 576; *Warde's case*, *ib.* 624.

(*k*) *Re National Funds Assur. Co.*, 10 Ch. D. 118. See, also, the cases in the last two notes, and *Devaynes v. Noble*, *Sleech's case*, 1 Mer. 563;

Baring's case, *ib.* 614; *Brydges v. Branfill*, 12 Sim. 369; *Wilson v. Moore*, 1 M. & K. 127 and 337. Compare, however, *Parker v. McKenna*, 10 Ch. 123, and *Vyse v. Foster*, L. R. 7 H. L. 318, as to liability for profits arising from breaches of trust.

(*l*) 8 Ch. D. 807, *per* James and Baggallay, L.JJ., Lord Bramwell dissenting. See, as to breaches of trust, *Ex parte Sheppard*, 19 Q. B. D. 84; and *ante*, note (*k*).

engagements of the partners, and holds each partner liable for them accordingly. Moreover, if judgment is obtained against the firm for a debt owing by it, the judgment creditor is under no obligation to levy execution against the property of the firm before having recourse to the separate property of the partners; nor is he under any obligation to levy execution against all the partners ratably; but he may select any one or more of them and levy execution upon him or them until the judgment is satisfied, leaving all questions of contribution to be settled afterwards between the partners themselves (*m*).¹

(*m*) See *per De Grey, C. J.*, in *Abbott v. Smith*, 2 Wm. Blacks. 949; and *Wooley v. Kelley*, 1 B. & C. 68; Com. Dig. Execution, H. See further on this subject, *infra*, ch. 3, § 3.

¹ *Benchley v. Chapin*, 10 Cush. 173; *Morrell v. Trenton Mut. L. & F. Ins. Co.*, 10 Cush. 282; *Leinkauff v. Munter*, 76 Ala. 194; *Collins v. Charlestown Mut. F. Ins. Co.*, 10 Gray, 155; *Allen v. Owens*, 2 Speers (S. C.) 170; *Dean v. Phillips*, 17 Ind. 406; *Nebraska R. R. Co. v. Lett*, 8 Neb. 251; *Medberry v. Soper*, 17 Kan. 369; *Randolph v. Daly*, 16 N. J. Eq. 313; *National Bank v. Sprague*, 20 id. 13; *Clayton v. May*, 68 Ga. 27; *Haralson v. Campbell*, 63 Ala. 278; *Hardy v. Overman*, 36 Ind. 549; *Saunders v. Reilly*, 105 N. Y. 12, 21; *Judd Linseed & Sperm Oil Co. v. Hubbell*, 76 id. 543. *Contra*, that partnership property must first be exhausted. *Crowinshield v. Strobel*, 2 Brev. (S. C.) 80.

In Louisiana there is a distinction between ordinary and commercial partnerships; partners in the latter being held to the fullest extent (*in solido*), while in ordinary partnerships a partner is not individually liable for any greater sum than his proportionate share of the indebtedness. *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. ed. 731; *Beauregard v. Case*, 91 U. S. 134, 23 L. ed. 263; *Dyer v. Drew*, 14 La. Ann. 67; *Lalande v. McRae*, 16 id. 193; *Villa v. Jonte*, 17 id. 9.

To the general rule that the partnership property, and each partner's property, is liable for the partnership debts to the full extent of the debt, there is an exception in the statutory exemptions of those states where the courts have decided that such exemptions may be claimed out of partnership property. There are sixteen states whose constitutions provide for homestead exemptions, and three more provide other exemptions, and the courts are not in harmony as to their application.

In Massachusetts it was decided in *Pond v. Kimball*, 101 Mass. 105, that the provisions of the Gen. Stats. c. 123, § 32, and c. 133, § 32, cl. 5, 6, exempting a certain amount of tools and implements, stock and material, employed in trade or business, from attachment and execution, do not apply to partnership property.

In Wisconsin and Georgia, by consent of one's co-partners, one may have a separate exemption of partnership property seized on execution against the firm. *O'Gorman v. Fink*, 57 Wis. 649; s. c. 46 Am. Rep. 58; *Blanchard v. Paschal*, 68 Ga. 32; s. c. 45 Am. Rep. 474. The same exemption which the partner would have had out of his severalty. *Wicker v. Comstock*, 52 Wis. 315; *Spade v. Bruner*, 72.

In *O'Gorman v. Fink, supra*, the court discriminate *West v. Ward*, 26 Wis. 579, in which a married man residing on real estate owned by him in common with others, claimed a homestead exemption in an undivided interest (this

[*201] * **Attempts to limit liabilities.**¹— Various attempts have been made from time to time to form partnerships without exposing their members to ruin in the event of loss. But the only effectual method of accomplishing this object is to stipulate with each creditor that he shall only be paid out of the funds of the partnership, and that he shall not be entitled to require the individual partners to pay more than a certain amount of those funds. Such stipulations,

was done in *Hunnicut v. Summey*, 63 Ga. 586), and *Wright v. Pratt*, 31 Wis. 99, in which it is intimated that a tenant in common of an indivisible chattel, cannot have an exemption out of his interest in it, and *Russell v. Lennon*, 39 Wis. 570; s. c. 20 Am. Rep. 60, in which the partners claimed a joint exemption. In *Burns v. Harris*, 67 N. C. 140, and *Till's Case*, 3 Neb. 261, the court holds that the separate exemption will not be allowed unless all the partners consent thereto; but this the Ohio court, in *Gaylord v. Imhoff*, 26 Ohio St. 317; s. c. 20 Am. Rep. 762, say has the effect of making a positive statutory right depend for its enforcement upon the mutual consent of partners. Citing also as *contra*, *Pond v. Kimball*, *supra*, and *Bonsall v. Conly*, 44 Penn. St. 442.

"We have said there was no evidence in this case which tended to prove that each partner for himself claimed his exemption in the partnership property; that each made a demand for it of the defendant. Consequently it must be assumed that each consented that the others should individually exercise his right of selection. Should the jury find these facts established by the evidence, the plaintiff should be allowed his exemption. It is said he made no proper demand for it, and did not notify the defendant that he had made a selection from the general stock. We do not suppose any other demand was necessary than that the plaintiff should inform the defendant that he claimed his exemption, and that the other partners did the same, and asked that he be permitted to make his selection." *O'Gorman v. Fink*, *supra*.

In *Blanchard v. Paschal*, 68 Ga. 32, the consent of the co-partners was after the levy, and the court say that not to allow the exemption would be to override the constitution.

In *Skinner v. Shannon*, 44 Mich. 86; s. c. 38 Am. Rep. 232, the court held that where execution is levied on the goods of a partnership, every member of the firm is entitled to his individual exemption. "That the several members of a co-partnership come within the language of the statute and constitution, there should be no question; and that they by becoming members of a firm do not place themselves beyond the pale of the reason of the law, would seem clear." "The whole object of the law is to prevent a person from being stripped of all means of carrying on his business, and in this respect no distinction can be made between those who are members of a firm and those who are not."

See *Rosenthal v. Scott*, 41 Mich. 632; *Stewart v. Welton*, 32 id. 56; *Barber v. Rorabeck*, 36 id. 399; *Bayne v. Patterson*, 40 id. 658; *Lozo v. Sutherland*, 38 id. 168; *Orr v. Shraft*, 22 id. 260; *Bunker v. Paquette*, 37 id. 79; *Vanderhorst v. Bacon*, 38 id. 669; s. c. 31 Am. Rep. 328; *Stewart v. Brown*, 37 N. Y. 350.

See *contra*, *Spiro v. Paxton*, 3 Lea, 75; s. c. 31 Am. Rep. 630; *White v. Heffner*, 30 La. Ann. 1280; s. c. 31 Am. Rep. 238; *West v. Ward*, *supra*; *Russell v. Lennon*, *supra*; *Pond v. Kimball*, *supra*; *Wright v. Pratt*, *supra*; *Wise v. Frey*, 7 Neb. 134; s. c. 29 Am. Rep. 380.

¹ The rule of the liability *in solido*, of the partner, prevails, no matter how numerous the partners. See the cases on joint-stock companies and associations, *infra*.

however, are never made in practice except where the partners are numerous; and in modern times they are practically confined to Insurance and other companies formed before the passing of the Companies Act, 1862. The cases on this subject will be found collected in the volume relating to companies (*n*).¹ The statute under which a person may share

(*n*) The leading cases on this subject are *Halket v. Merchant Traders' Loan Assoc.*, 13 Q. B. 960; *Hassell v. Same*, 4 Ex. 525; *Hallett v. Dowdall*, 18 Q. B. 2; *Durham's case*, 4 K. & J. 517; *Re Athenæum Soc.*, Johns. 80, and 3 De G. & J. 660.

¹ The rights and liabilities of partners under the English statutes were discussed by Justice Lindley in this connection in the 4th ed. of his work, pp. 383 *et seq.* This relation is wholly of statute creation, and is provided for by the laws of all the states. These statutes are substantially alike, and have been construed by the courts of the various states with such general uniformity as their special features would admit. The cases upon this branch of the Law of Partnership have been collected and classified by Mr. Bates in his excellent treatise on Limited Partnership. The principles which govern limited partnerships may be generally stated as follows: that while it is debatable whether these statutes are in derogation of the Common Law and to be construed strictly or otherwise, it may be said there must be a substantial compliance with the statutes of the state where the partnership is located. It must be confined to the business permitted by the statutes; and if it engage in a branch of business not provided for, it becomes a general partnership. The special partner contributes to the fund a fixed sum either in cash, as required by the statutes of most of the states, or in kind, at a valuation specially allowed and provided for. The terms of the partnership must be published as provided by the local statute and remain unchanged during the period for which the partnership was formed. Any change in the style of the firm, the persons who constitute it, the business, the capital or shares thereof work a dissolution or change the partnership to a general partnership. The business is to be carried on by the general partners; and interference by the special partner, except in the manner allowed by statute, renders him liable as a general partner. *Henkel v. Heyman*, 91 Ill. 96; *Pierce v. Bryant*, 5 Allen, 91; *Vandike v. Roskam*, 67 Penn. St. 330; *Foquet v. Hoadley*, 3 Conn. 534; *Barrows v. Downs*, 9 R. I. 446; *Hutchinson v. Bowes*, 15 Ont. Q. B. 156; *Farnsworth v. Boardman*, 131 Mass. 115.

The contributions of the special partner must be in cash; and payments in goods or notes are not a compliance with the statute requiring cash payment. *Whittemore v. Macdonell*, 6 Ont. C. P. 547; *Benedict v. Van Allen*, 17 Ont. Q. B. 234; *Van Ingen v. Whitman*, 62 N. Y. 513; *Richardson v. Hogg*, 38 Penn. St. 153; *Haggerty v. Foster*, 103 Mass. 17; *Pierce v. Bryant*, 5 Allen, 91; *Durant v. Abendroth*, 69 N. Y. 148; *Patterson v. Holland*, 7 Ont. Chy. 1.

The special partnership may be renewed or continued, but in the same conditions as at its inception. *Haddock v. Grinnell Mfg. Co.*, 109 Penn. St. 372. There must be a new certificate, or the partnership becomes general. *Andrews v. Schott*, 10 Penn. St. 47. If dissolved for any cause during the term for which it is formed, the statutory notice must be given, and published, and recorded. *Beers v. Reynolds*, 11 N. Y. 97; s. c. 12 Barb. 288. But see *Ker v. People*, 110 Ill. 627.

Dissolution by death, bankruptcy, by limitation, and otherwise seems to be governed by the same rules as general partnership on time; and courts of equity may appoint a receiver to wind up the concern and distribute the assets

profits without incurring the liability of a partner has been already alluded to (o).

(o) 28 & 29 Vict. c. 86, *ante*, book i., ch. 1, § 2.

as a trust fund on the application of a creditor, either general or special, a partner, or the representative of a deceased partner. *Wilkins v. Davis*, 2 Lowell, 511; *Snyder v. Leland*, 127 Mass. 291. See *Perth Amboy Mfg. Co. v. Condit*, 21 N. J. Law, 659.

In *Dehon v. Foster*, 4 Allen, 545, and 7 Allen, 57, a creditor was enjoined in equity from pursuing an attachment in another state against an insolvent in the state of his residence; but when the assignee of a general partner in insolvency sought to recover of a creditor the amount obtained by him in another state by attachment after the known insolvency of the firm, the court said, "Courts of law will not afford a remedy in damages where a court of equity might interfere to prevent a wrong. *Lawrence v. Batcheller*, 131 Mass. 504."

Removal from the county where the certificate was filed renders this partnership general. *Riper v. Poppenhausen*, 43 N. Y. 68.

Consulting with one of the firm, and telegraphing to parties in New York who desired information that the firm was all right, would not make a special partner (*in commendam*) liable as a general partner. Any stranger could have done so without implicating himself. *Ulman v. Briggs*, 32 La. Ann. 657.

Indorsing for, lending money or notes to, or going security for the firm will not make a special partner liable as holding himself out a general partner. These are things any stranger might do and not be liable; they are not active participants in the business. *Rayne v. Terrell*, 33 La. Ann. 812 (1881).

Defendant being described as general partner of the firm of D. B. & Co., and evidence that the steamer was owned by D. B. & Co., held sufficient to charge defendant, there being no plea in abatement. *Howland v. Bethune*, 13 Ont. Q. B. 270.

Building and running steamships may properly be the subject of a limited partnership under the Act. *Bowes v. Holland*, 14 Ont. Q. B. 316.

An intended special partner in a large partnership can, by interfering and exercising control, through a committee of which he is chairman, render himself liable as a general partner. *Bowes v. Holland*, 14 Ont. Q. B. 316.

An intended special partner made liable as general partner and therefore bound by the partnership signature as maker of a note cannot recover against the endorsers. *Bowes v. Holland*, 14 Ont. Q. B. 316.

Where a special partner has once rendered himself liable as a general partner under § 14 by interference, he so continues after he has ceased to intermeddle. *Hutchinson v. Bowes*, 15 Ont. Q. B. 156.

Where defendants are charged as general partners, having become so liable by intermeddling, it is not necessary for plaintiff to show that the limited partnership was regularly formed under the statute. *Davis v. Bowes*, 15 Ont. Q. B. 280.

The special partners elected a board of directors to advise the general partner, the members of which board interfered in the transaction of the business of the firm, especially during the absence of the sole general partner in England. Held, that the members of the board became liable for the debts of the firm. *Whittemore v. Macdonell*, 6 Ont. C. P. 547.

The Act requires actual cash payments; and in case of any false statements in certificate, all the partners are liable. *Whittemore v. Macdonell*, *supra*.

In forming a limited partnership under the Act of 1836, the object of the Act being information to creditors, strict compliance with the essential requirements of the statute is necessary, as well on a renewal as on the original formation; and the affidavit of a general partner on a renewal that a sum specified and stated to have been paid by a special partner in former articles

SECTION III. — DURATION OF LIABILITY.

In a preceding chapter it was shown that every member of an ordinary partnership is the general agent of the firm for the purpose of carrying on its business in the ordinary way. In the present section it is proposed to ascertain the duration of such agency, or in other words, when it begins and when it ends. The mode whereby a partner becomes discharged from liabilities incurred by him will then be considered, and thus the liabilities of incoming and outgoing partners to creditors will be determined.

of co-partnership has been so contributed and remains in the common stock without stating in what condition it so remains is insufficient. *Haddock v. Grinnell Mfg. Co.*, 109 Penn. St. 372.

In order to obtain the benefit of the Limited Partnership Act by renewal of the original agreement as far as the special capital is concerned, it must appear that such capital is in the same condition as when the partnership was originally formed, unimpaired and available for creditors; and these facts must appear from the affidavit of the general partner. *Haddock v. Grinnell Mfg. Co.*, *supra*.

During any period intervening between the expiration of a limited partnership and the date of its renewal such partnership is general, and the special partners of the old firm are liable for all debts incurred during that period. *Haddock v. Grinnell Mfg. Co.*, *supra*.

Whether the occurrence of an interval between the expiration of a limited partnership and the renewal thereof between the same parties will of itself operate so as to prevent the renewal from inuring to the benefit of the special partner not decided. *Id.*

S. gave his certified check for \$10,000 deposited to credit of H. M. & Co., in payment of his special capital. Afterwards, same day, H. M. & Co. gave him their check for \$6500 on same bank, to be paid out of that \$10,000 on account of sum due S. from old firm of same name, limited to expire the day before. S. held liable as general partner. *Lineweaver v. Slagle*, 64 Md. 465; 54 A. R. 775. (See note by Reporter, 781.)

Several of a large number of intending special partners paid in their capital by promissory notes. Upon a bill by certain partners for contribution to make up a large deficiency ascertained on dissolution, Held, that the circumstance had rendered the parties general partners *inter se* and as to third persons. *Esten, V.-C.*, in *Patterson v. Holland*, 7 Ont. Chy. 1.

One of the members of a limited partnership appointed manager of the business, and so acting, furnished from his shop goods for the partnership upon which he charged the usual trade profits. Held, that *primâ facie* such transactions could not be sustained. *Patterson v. Holland*, 7 Ont. Chy. 1.

One of the special partners paid by bills of exchange the sums specified in the certificate as cash. Held, the special partner became in consequence liable for the debts of the firm. *Whittemore v. Macdonell*, 6 Ont. C. P. 547.

Where W., a special partner in T. & Co., a limited partnership when he gave the note signed T. & Co., represented to the payee that he was a partner and had an interest in the business. Held, sufficient to warrant a jury in finding W. equally liable with T. *Watts v. Taft*, 16 Ont. Q. B. 256.

B., special, paid in £750 by releasing to A. A.'s note for the amount. Held, not a payment in money. *Benedict v. Van Allen*, 17 Ont. Q. B. 234.

A description of the business as "general dealers" held not sufficient. *Benedict v. Allen*, 17 Ont. Q. B. 234.

1. COMMENCEMENT OF LIABILITY.

Commencement of agency. — The doctrine that each partner has implied authority to do whatever is necessary to carry on the partnership business in the usual way, is based upon the ground that the ordinary business of a firm cannot be [*202] carried on either to the advantage * of its members or with safety to the public, unless such a doctrine is recognised. The existence of a partnership is, therefore, evidently presupposed: and although persons negotiating for a partnership, or about to become partners, *may* be the agents of each other before the partnership commences, such agency, if relied on, must be established in the ordinary way, and is not to be inferred from the mere fact that the persons in question were engaged in the attainment of some common end, or that they have subsequently become partners. This is shown by the cases already referred to, when the difference between partnerships and inchoate partnerships was being discussed. Almost all those cases, in fact, arose in consequence of attempts made to fasten liability on the defendants, by reason of some act done by other persons, alleged to be their partners; and each of those cases in which the plaintiff failed is an authority for the proposition that so long as there is no partnership there is no implied authority similar to that which exists after a partnership is formed (*p*).

Liability of partners who defer the execution of articles. — But, although this is undoubted law, still if persons agree to become partners as from a future day, upon terms to be em-

(*p*) See the cases, *ante*, pp. 19 *et* Fin. 564; *Gabriel v. Evill*, 9 M. & *seq.*, and 43 *et seq.*; and especially W. 297. *Edmundson v. Thompson*, 2 Fos. &

To an action on a note signed by the firm the plea was "*non fecit*."

Quære if defendant was entitled to show a limited partnership. But being allowed to do so, Held, that plaintiff might in answer object to the description of the business, and *semble*, that he might also object that special partner had not paid in his share. *Benedict v. Van Allen*, 17 Ont. Q. B. 234.

Although intending to form a limited partnership, the partners may unknowingly so act as to make themselves liable to third parties as general partners; and when they so act with the consent and concurrence of all the parties, the effect may be to make them answerable as general partners between themselves also. *Patterson v. Holland*, 6 Ont. Chy. 414; 7 *id.* 1.

If the acts of special partners creating a general partnership as to the world are done by some of the partners without the knowledge or consent or against the consent of the others, they will not be entitled to contribution from the others, but will be liable to indemnify them against the consequence of the acts so done. *Patterson v. Holland*, 6 Ont. Chy. 414; 7 *id.* 1.

bodied in a deed to be executed on that day, and the deed is not then executed, but they nevertheless commence their business as partners, they will all be liable for the acts of each, whether those acts occurred before or after the execution of the deed (*q*). For the question in such a case is not, When was the deed executed? but rather this, When did the partners commence to carry on business as such? The agency begins from that time, whether they choose to execute any partnership deed or not.

Where there is an agreement for a partnership, and there is nothing to lead to the conclusion that the partnership was intended to commence at any other time, it will be held to commence from the date of the agreement (*r*).

Firm not liable for what a partner does before he joins it.¹—The agency of each partner commencing with the partnership, and not before, it follows that the firm is not liable for *what may be done by any partner before [*203] he become a member thereof. So that if several persons agree to become partners, and to contribute each a certain quantity of money or goods for the joint benefit of all, each one is solely responsible to those who may have supplied him with the money or goods agreed to be contributed by him (*s*); and the fact that the money or goods so supplied have been brought in by him as agreed, will not render the firm liable (*t*).

Upon this principle, apparently, it was held in *Wilson v. Whitehead* (*u*), that the author and publisher of a work were not liable for the paper supplied for it; the paper having been ordered by and supplied to the printer, who was to share the profits of the work. The agreement between the parties was that one should be the publisher, and make and receive general payments; that another should be editor; and that the third should print and find the paper for the work, charg-

(*q*) *Battley v. Lewis*, 1 Man. & Gr. 155.

(*r*) See *Williams v. Jones*, 5 B. & C. 108.

(*s*) See *Greenslade v. Dower*, 7 B. & C. 635; *Dickinson v. Valpy*, 10 B. & C. 141-2; *Fisher v. Tayler*, 2 Hare, 229, 230; and the cases in the next note.

(*t*) *Heap v. Dobson*, 15 C. B. N. S. 460; *Smith v. Craven*, 1 Cr. & J. 500.

(*u*) 10 M. & W. 503. See the observations of Wightman, J., on this case, in *Kilshaw v. Jukes*, 3 B. & Sm. 847.

¹ See *Driffill v. Goodwin*, *infra*, p. 205, note 1.

ing it, however, to the account of the three at cost price. The profits were to be equally divided amongst the three. It was, therefore, urged that all were liable for the paper supplied: but it was held that they were not; for the printer was not authorised to buy the paper except on his own account, and when he had bought it he might have used it for some other book. The case was likened to that of coach proprietors, where each horses the coach for one or more stages, and each agrees to bring into the concern the work and labour of his horses, and none of the others has any interest in them, though all share the profits (*x*).

Observations on *Wilson v. Whitehead*.—The propriety of the decision in this case has been doubted (*y*), and it is not easily reconcilable with a similar case decided at Nisi Prius (*z*). But the writer submits that upon principle

Wilson v. Whitehead is perfectly correct; for [*204] * the publisher had no real authority to buy the paper on the author's credit, and no authority so to do ought to be implied in favour of a person who knew nothing of the author or of any partnership or quasi-partnership existing between him and the publisher (*a*).

The two well-known cases of *Saville v. Robertson* (*b*) and *Gouthwaite v. Duckworth* (*c*), further illustrate the principle now in question. These cases closely resemble each other in many respects: for in each there was an agreement for a joint adventure in goods; in each an attempt was made to compel a person who did not order the goods to pay for them, on the grounds that he was in partnership with the person who did order them, and that they were supplied and used for the joint adventure: and in each the defence was that the goods were ordered before any partnership commenced, so that the defendant was not liable for the purchase made by his co-partner. In *Saville v. Robertson* the defence was proved and prevailed, whilst in *Gouthwaite v. Duckworth* the defendant was compelled to pay. In order to explain the apparent conflict between the two cases, it is necessary to state shortly the material facts in each.

(*x*) *Barton v. Hanson*, 2 Taunt. 49, which shows that in such a case each is alone liable for hay, &c., supplied to his own horses.

(*y*) See *per* Wightman, J., in 3 Best & Sm. 871.

(*z*) *Gardiner v. Childs*, 8 Car. & P. 345.

(*a*) See *Kilshaw v. Jukes*, 3 Best & Sm. 847, and *ante*, p. 31.

(*b*) 4 T. R. 720.

(*c*) 12 East, 421.

In *Saville v. Robertson* (*d*), several persons agreed to share the profit and loss of an adventure in goods, of a kind to be fixed by a majority; but no one was to have any share or proportion in the adventure except to the amount of the goods ordered and shipped by himself; and no adventurer was to be answerable for anything ordered or shipped by any co-adventurer. One of the adventurers having ordered goods and not paid for them, it was contended that his co-adventurers were liable for them, on the ground that he and they were partners. But the Court held that no partnership commenced until the goods were on board; each partner was to bring in his share only, and his co-partners were not liable to persons who supplied him with the means which enabled him to bring in such share.

*In *Gouthwaite v. Duckworth* (*e*), Browne and [*205] Powell, who were in partnership, were indebted to Duckworth, and it was agreed that all three should join in an adventure in the purchase and sale of goods; that the goods should be bought, paid for, and shipped by Browne and Powell, and that the proceeds of the sale should be remitted to Duckworth, who should deduct thereout the amount of his debt, and then share the profit of the adventure with Browne and Powell. It was also agreed that in the event of a loss Duckworth should share it. In consequence of this agreement, Browne bought goods for the adventure on credit, and it was held that all the three, viz., Browne, Powell, and Duckworth, were liable to pay for them; for the goods were bought, in pursuance of the agreement for *the adventure*, and although it was never intended that Duckworth should pay for the goods, yet it was thought that the adventure commenced with the purchase of the goods, and that Duckworth was therefore liable.

Observations on *Gouthwaite v. Duckworth*. — There is considerable difficulty in supporting this decision, if rested on the ground of partnership and implied agency resulting therefrom; for it is not easy to see how any partnership existed prior to the purchase of the goods. But if rested on

(*d*) 4 T. R. 720. See, also, *Hutton v. Bullock*, L. R. 8 Q. B. 331, and 9 ib. 572; *Kilshaw v. Jukes*, 3 Best & Sm. 847.

(*e*) 12 East, 421; *Kilshaw v. Jukes*, 3 B. & Sm. 847, was certainly very like this case, but was decided in accordance with *Saville v. Robertson*. See *ante*, p. 31.

the ground of agency independently of partnership, there is not the same difficulty. For although the goods were to be paid for by Browne and Powell, that might be regarded as nothing more than a stipulation to take effect as between them and Duckworth; it did not necessarily exclude the inference that as Browne and Powell were to buy for the adventure, they were at liberty to procure the goods on the credit of all concerned (*f*).

Liability of incoming partner. — As the firm is not liable for what is done by its members before the partnership between them commences, so upon the very same principle a person who is admitted as a partner into an existing firm does not by his entry become liable to the creditors of the firm for anything done before he became a partner.¹ Each [*206] partner is, it is true, the agent of the firm; *but, as before pointed out, the firm is not distinguishable from the persons from time to time composing it; and when a new member is admitted he becomes one of the firm for the future, but not as from the past, and his present connection with the firm is no evidence that he ever expressly or impliedly authorised what may have been done prior to his admission. It may perhaps be said that his entry amounts to a ratification by him of what his now partners may have done before he joined them (*g*). But it must be borne in mind that no person can be rendered liable for the act of another on the ground that he has ratified, confirmed, or adopted it, unless, at the time the act was done, it was done on his behalf (*h*). Therefore, in *Young v. Hunter* (*i*), where

(*f*) See *Young v. Hunter*, 4 Taunt. 582, the judgment of Gibbs, J.

(*h*) *Wilson v. Tumman*, 6 Man. & Gr. 236.

(*g*) See *Horsley v. Bell*, 1 Bro. C. C. 101, note, *per* Gould, J.

(*i*) 4 Taunt. 582.

¹ The knowledge by M., intending partnership with G., that the real estate to purchase which the partnership was being formed, and for which G. was negotiating, was being sold to defraud the vendor's creditors, does not affect G., unless communicated to him. *Driffill v. Goodwin*, 23 Ont. Chy. 431.

Incoming partner entered into a joint liability with his co-partners (with notice to creditors), for prior and subsequent debts. Held liable for debts contracted before he became a partner of the firm. *Hine v. Beddome*, 8 Ont. C. P. 381.

But where, by an oral agreement of partnership, W. undertook to be liable for M.'s debts incurred in the particular business prior to the partnership, and this agreement was not communicated to M.'s creditors, it was held that W. was liable only for goods supplied after the partnership. *McKeand v. Mortimore*, 11 Ont. Q. B. 428.

Hunter & Co. had ordered goods of the plaintiff for sale in the Baltic, and *afterwards* it was agreed between Hunter & Co. and Hoffham and Co. that the latter should join in the adventure, and share the profit and loss, it was held to be clear that Hoffham & Co. were not liable to the plaintiff to pay for the goods.

So in *Ex parte Jackson* (*j*), a person who was indebted by bond for money borrowed to carry on a trade, took two other persons ostensibly into partnership. After two years a joint commission of bankruptcy issued against the three; and it was held that the bond debt was not provable as a partnership debt against the joint estate, but remained what it was originally, the separate debt of the obligor.

Application of principle to promoters of companies. — Again, in *Beale v. Moulds* (*k*), the members of a provisional committee of a company entered into a special agreement with the plaintiff for the manufacture of a steam carriage. Afterwards, but before the contract was completed, the defendant Moulds became a member of the committee, and interested himself in the completion of the carriage. Several alterations and payments on account were also made whilst he was a member, and with his knowledge. The carriage was completed, but the committee then refused to take it or to pay for it. In *an action brought against [*207] Moulds and the other members of the committee, it was held that Moulds was not liable. He was not liable on the special contract, for he was no party thereto, by himself or any agent; and he could not be made liable on any implied contract, for the existence of a special agreement excluded any implied contract relative to the same subject matter. It follows from the principles on which this case was determined, that if the carriage had been accepted by the committee, Moulds would not have been liable to pay for it. The delivery and acceptance in such a case would have been in pursuance of the contract, to which *ex hypothesi* he was no party; and no liability could attach to him by virtue of any implied contract to pay that which became payable by virtue of an express contract made with other people. It has, indeed, been expressly decided, that if several mem-

(*j*) 1 Ves. J. 131.

569; *Kerridge v. Hesse*, 9 C. & P.

(*k*) 10 Q. B. 976. See, too, *Brem-* 200.
ner v. Chamberlayne, 2 Car. & Kir.

bers of a committee order goods, and then a new member joins the committee, he is not liable to pay for the goods, though they are delivered after he joined it (*l*).

New contract.—Cases, however, of this kind must not be confounded with those in which a new though tacit contract is made after the introduction of a new partner. *Dyke v. Brewer* (*m*) illustrates the distinction alluded to. In that case the plaintiff agreed with A. to supply him with bricks at so much per thousand, and the plaintiff began to supply them accordingly. B. then entered into partnership with A., and the plaintiff continued to supply bricks as before. It was held that both A. and B. were liable to pay, at the rate agreed upon, for the bricks supplied to both after the partnership commenced. The ground of this decision was, that as A. had not ordered any definite number of bricks, each delivery and acceptance raised a new tacit promise to pay on the old terms; although if all the bricks delivered had been ordered by A. in the first instance, he alone would have been liable to pay for them (*n*).

[*208] * **Incoming partner taking debts on himself.**—If an incoming partner chooses to make himself liable for the debts incurred by the firm prior to his admission therein, there is nothing to prevent his so doing. But it must be borne in mind, that even if an incoming partner agrees with his co-partners that the debts of the old shall be taken by the new firm, this, although valid and binding between the partners is, as regards strangers, *res inter alios acta*, and does not confer upon them any right to fix the old debts on the new partner (*o*). In order to render an incoming partner liable to the creditors of the old firm, there must be some agreement, express or tacit, to that effect entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement the incoming partner will be bound by it, but his liabilities in respect of

(*l*) *Newton v. Belcher*, 12 Q. B. 921; *Whitehead v. Barron*, 2 Moo. & Rob. 248. In *Beech v. Eyre*, 5 Man. & Gr. 415, the goods were both ordered and supplied at a time when there was evidence to show that the defendant was one of the committee.

(*m*) 2 Car. & Kir. 828.

(*n*) *Helsby v. Mears*, 5 B. & C. 504, is another case turning on the same principle as is explained by Lord Denman in *Beale v. Moulds*, 10 Q. B. 976.

(*o*) See *per Parke, J.*, in *Vere v. Ashby*, 10 B. & C. 298; *Ex parte Peele*, 6 Ves. 602; *Ex parte Williams*, Buck, 13.

the old debts will attach by virtue of the new agreement, and not by reason of his having become a partner.¹

Evidence of agreement to do so.—An agreement by an incoming partner to make himself liable to creditors for debts owing to them before he joined the firm, may be, and in practice generally is, established by indirect evidence. The Courts, it has been said, lean in favour of such an agreement, and are ready to infer it from slight circumstances (*p*); and they seem formerly to have inferred it whenever the incoming partner agreed with the other partners to treat such debts as those of the new firm (*q*). But this certainly is not enough, for the agreement to be proved is an agreement with the creditor; and of such an agreement an arrangement between the partners is of itself no evidence (*r*).

As an instance where an incoming partner made himself liable for debts contracted by the firm before he joined it, reference may be made to *Ex parte Whitmore* (*s*).

In that *case Warwick and Clagett became partners. [*209] Warwick, who had had dealings with merchants in America, informed them that he had taken Clagett into partnership, and requested them to make up their accounts, and transfer any balance due to or from him (Warwick) to the new firm. These instructions were repeated and confirmed

(*p*) *Ex parte Jackson*, 1 Ves. J. 131; *Ex parte Peele*, 6 Ves. 602. See, also, *Rolfe v. Flower*, L. R. 1 P. C. 27.

(*q*) See *Cooke's Bank*, Law, 534 (8th ed.), citing *Ex parte Bingham* and *Re Staples*; *Ex parte Clowes*, 2 Bro. C. C. 595.

(*r*) *Ex parte Peele*, 6 Ves. 602; *Ex parte Parker*, 2 M. D. & D. 511. See, also, *Ex parte Freeman*, Buck, 471; *Ex parte Fry*, 1 Gl. & J. 96; *Ex parte Williams*, Buck, 13.

(*s*) 3 Deac. 365. See, also, *Rolfe v. Flower*, L. R. 1 P. C. 27, which was a stronger case.

¹ Though an incoming partner is not liable for the debts of the firm prior to his admission, there are many cases in which the new partner and the new firm are held liable from their dealings with creditors for the obligations of the old firm. *Shoemaker Piano Manufacturing Co. v. Bernard*, 2 Lea, 358; *Silverman v. Chase*, 90 Ill. 37; *Updike v. Doyle*, 7 R. I. 446; *Parmalee v. Wiggenhorn*, 6 Neb. 322; *Osborn v. Osborn*, 36 Mich. 48; *Preusser v. Henshaw*, 49 Iowa, 41; *Smith v. Ledyard*, 49 Ala. 279; *Shaw v. McGregory*, 105 Mass. 96; *Morrison v. Blodgett*, 8 N. H. 238.

An incoming partner who succeeds an outgoing partner by purchase, or who joins with the survivors on the death of one partner, is liable only by agreement for the prior debts of the old firm; and such agreement can only be enforced by the old firm. *Serviss v. McDonnell*, 107 N. Y. 260. And an agreement by a third person to indemnify an outgoing partner, when no consideration passed to the promisor cannot be enforced against him by a creditor. *Berry v. Brown*, 107 N. Y. 659.

by Warwick and Clagett, and were acted on. A debt owing from Warwick was placed to the debit of the new firm, and a bill was drawn on the firm for the amount of the debt and was accepted, but was dishonoured. On the bankruptcy of the firm it was held, that the debt in question had become the joint debt of Warwick and Clagett; and not only so, but that the joint liability of the two had been accepted in lieu of the sole liability of Warwick.

Bills by old partners for old debts a fraud on new partner. — Before leaving this subject, it may be as well to observe that, as an incoming partner does not, by the fact of entering the firm, take upon himself the then existing liabilities thereof, if after he has joined the firm his co-partners give a bill or note in their and his name for a debt contracted by them alone, this is *primâ facie* a fraud upon him, and consequently he will not be liable to a holder with notice (*t*).

Account stated in respect of old debt. — For similar reasons, an incoming partner will not, it is apprehended, be liable to pay a debt contracted before he became a partner, merely because his co-partner has afterward stated an account with the creditor, and thereby admitted that the debt in question is due from the firm (*u*). But, as will be seen hereafter, an incoming partner, unless he takes care, may find himself liable to pay the balance of an open running account commencing before he joined the firm and continued afterwards, although payments have been made since he joined the firm sufficient to liquidate that part of the account for which he is directly responsible (*x*).

[*210]

* 2. TERMINATION OF LIABILITY.

When a partner's liability ends. — Before examining the circumstances which put an end to a partner's liability to creditors of the firm, it is necessary to draw attention to the distinction between a partner's liability for what may be done after his co-partners have ceased to be his agents, and his liability for what may have been done whilst their agency

(*t*) See *Shireff v. Wilks*, 1 East, 48, *ante*, p. 173.

(*u*) See as to accounts stated, *French v. French*, 2 Man. & Gr. 644, and *Lemere v. Elliott*, 6 H. & N. 656.

(*x*) See *Beale v. Caddick*, 2 H. & N. 326, and *Scott v. Beale*, 6 Jur. N. S. 559, noticed *infra*, under the head of Appropriation of Payments.

continued. It is obvious that there may be many circumstances which have no effect upon a liability already accrued, but which, nevertheless, may prevent any liability for what is not yet done from arising; and in order to determine with accuracy the events which put an end to a partner's liability to creditors, it is necessary to distinguish his liability for the future from his liability for the past.

A. *Termination of liability as to future acts.*

A partner's agency ends by notice.—The agency of each partner in an ordinary firm, and his consequent power to bind the firm, *i.e.*, himself and his co-partners, may be determined by notice at any time during the continuance of the partnership (*y*); for his power to act for the firm is not a right attaching to him as partner independently of the will of his co-partners, and although any stipulations amongst the partners themselves will not affect non-partners who have not notice of them, yet if any person has notice that one member of the firm is not authorised to act for it, that person cannot hold the firm liable for anything done in the teeth of such notice (*z*).

With one or two exceptions, which will be mentioned presently, the agency of each partner and his consequent power to bind his co-partners, can only be effectually determined by giving notice of its revocation. The authority imputed to each partner must continue until some event happens to put an end to it, and this event ought to be as generally known as that which conferred the authority upon *him. The same reason which leads to the imputa- [*211] tion of the power to act for the firm at all, demands that such power shall be imputed so long as it can be exercised and is not known to have been determined (*a*).

To this principle there are exceptions which may be conveniently disposed of before the principle itself and its application are discussed.

(*y*) See *Vice v. Fleming*, 1 Y. & J. 227; *Willis v. Dyson*, 1 Stark. 164; *Rooth v. Quin*, 7 Price, 193; *Galway v. Mathew*, 1 Camp. 402, and 10 East, 264.

(*z*) This subject has been already discussed, see *ante*, p. 170 *et seq.*

(*a*) As to the liability of an outgoing partner for the acts of his late partners and a new partner, see *Scarf v. Jardine*, 7 App. Ca. 345, noticed *ante*, pp. 46 and 197.

1. **Effect of death.**—When a partner dies. Notice of death is not requisite to prevent liability from attaching to the estate of a deceased partner, in respect of what may be done by his co-partners after his decease (*b*). For, by the law of England, the authority of an agent is determined by the death of his principal, whether the fact of death is known or not (*c*).¹

The death of one partner does not, however, determine an authority given by the firm through him before his death; and consequently, if after his death such an authority is acted on, the surviving partners will be liable for it. In *Usher v. Dauncey* (*d*), bills were drawn and endorsed in blank by a partner in the name of the firm, and were given by him to a clerk to be filled up and negotiated as occasion might require. The partner in question died, and after his death, and after the name of the firm had been altered, one of the bills was filled up and negotiated. Lord Ellenborough held that the bill was binding on the surviving partners, considering that the power to fill up the bill emanated from the partnership and not from the individual partner who had died.

Contribution after death.—Moreover, it does not follow that because a creditor has no remedy against the estate of a deceased partner in respect of debts contracted by his co-partners since his death, his estate is not liable to [*212] contribute to such debts at the suit of the *surviving partners. That is a different matter altogether, and depends on the agreement into which he entered with his co-partners, as will be seen hereafter when the subject of dissolution is under consideration (*e*).

(*b*) *Devaynes v. Noble, Houlton's case*, 1 Mer. 616; *Johnes' case*, ib. 619; *Brice's case*, ib. 620; *Webster v. Webster*, 3 Swanst. 490. See *Vulliamy v. Noble*, 3 Mer. 614; *Brown v. Gordon*, 16 Beav. 302, as to the power of surviving partners who are executors of the deceased partner, to bind his estate.

(*c*) See *Blades v. Free*, 9 B. & C. 167; *Smout v. Ilbery*, 10 M. & W. 1; *Campanari v. Woodburn*, 15 C. B. 400.

(*d*) 4 Camp. 97.

(*e*) For instances where the estate of a deceased shareholder has been held liable to contribute to debts incurred since his decease, see *Baird's*

¹ This rule would hardly seem to need authorities (3 Kent Com. 63, 67; Story, Part. 319); but see *Marlett v. Jackman*, 3 Allen, 287, where the obligation of the surviving partner to give notice of dissolution by death is considered as a novel question. See, also, *Lyon v. Johnson*, 28 Conn. 1; *Williams v. Rogers*, 14 Bush, 776.

2. **Effect of bankruptcy.** — When a firm becomes bankrupt, the authority of each member to act for the firm at once determines. If one partner only becomes bankrupt, his authority is at an end, and his estate cannot be made liable for the subsequent acts of his solvent co-partners. At the same time, if notwithstanding the bankruptcy of one partner the others hold themselves out as still in partnership with him, they will be liable for his acts, as if he and they were partners (*f*); and although the estate of a bankrupt partner does not incur liability for the acts of the other partners done since the bankruptcy, yet the solvent partners have power to bring the partnership transactions to an end, and to dispose of the partnership property. This subject will be examined hereafter in the chapter on Bankruptcy, to which the reader is therefore referred (*g*).

3. **Effect of retirement of dormant partner.** — Another apparent but not real exception to the rule, is that if a dormant partner (*i.e.*, one not known to be a partner) (*h*) retires, the authority of his late partners to bind ceases on his retirement, although no notice of it be given. But this is because he never was known to be a partner at all, and the reason for the general rule has therefore no application to his case. The following decisions illustrate this exception: In *Carter v. Whalley* (*i*), the defendant Saunders was a partner in the "*Plas Madoc Colliery Co.*," but there was nothing to show that the plaintiff or the public ever knew that such was the case. Saunders withdrew from the company, but no notice of his withdrawal was given either to the plaintiff or to the public. After his withdrawal, the company became indebted to *the plaintiff, and [*213] it was held that Saunders was not liable for the debt; because the name of the company gave no information as to the parties composing it, and Saunders himself was not known either to the plaintiff or to the public to have belonged to the company before he withdrew.

In *Heath v. Sansom* (*k*), the defendants Sansom and

case, 5 Ch. 725; Blakeley's Executor's case, 3 Mc. & G. 726; Hamer's Devises' case, 2 De G. M. & G. 366.

(*f*) See *Lacy v. Woolcott*, 2 Dowl. & Ry. 458.

(*g*) See *Fox v. Hanbury, Cowp.* 445; *Morgan v. Marquis*, 9 Ex. 145.

(*h*) A dormant partner known to a few persons to be a partner is not dormant as to them; see the cases cited *infra*, note (*r*).

(*i*) 1 B. & Ad. 11.

(*k*) 4 B. & Ad. 172.

Evans carried on business as partners under the style of Philip Sansom & Co., but Evans was not known to be a partner. They dissolved partnership by mutual agreement, but did not notify the fact. After the dissolution, Sansom gave the plaintiff a promissory note on which he sued Sansom and Evans. The Court decided that Evans was not liable, for when his right to share profits ceased, he could not be held responsible for the subsequent acts of his co-partner, unless he authorised those acts or held himself out as still connected with him, and he had done neither (*l*).

Effect of lunacy.—With the three exceptions which have been noticed, the general proposition above stated holds good. Thus, if a partner becomes lunatic, and his lunacy is not apparent or made known, his power to bind the firm and his liability for the acts of his co-partners (*m*) will remain unaffected.

Effect of dissolution of which no notice is given.—So, if a partnership is dissolved, or one of the known members retires from the firm, until the dissolution or retirement is duly notified, the power of each to bind the rest remains in full force, although as between the partners themselves a dissolution or a retirement is a revocation of the authority of each to act for the others (*n*). Thus, if a known partner [**214*] *retires, and no notice is given, he will be liable to be sued in respect of a promissory note made since his retirement by his late partner, even though the plaintiff had no dealings with the firm before the making of the note (*o*). And in determining which was first in point of

(*l*) See, too, *Evans v. Drummond*, 4 Esp. 89. This doctrine seems not to apply to Scotland, see *Hay v. Mair*, 3 Ross, L. C. on Com. Law, 639. The case of the Western Bank of Scotland *v. Needell*, 1 Fos. & Fin. 461, seems at first sight opposed to the authorities in the text, but it is conceived that in that case there must have been evidence to show that the defendant was known to the plaintiffs to have been a partner before he retired.

(*m*) See *Molton v. Camroux*, 2 Ex. 487, and 4 ib. 17; and *Baxter v. The Earl of Portsmouth*, 5 B. & C. 170, and the cases cited *post*, bk. iv. c. 1, §

2, to show that the lunacy of one partner does not dissolve the firm. See further on this subject, *Story on Agency*, § 481, and note there. See, also, *Drew v. Nunn*, 4 Q. B. D. 661.

(*n*) See *Mulford v. Griffin*, 1 Fos. & Fin. 145; *Faldo v. Griffin*, ib. 147, and the cases in the next note.

(*o*) See *Parkin v. Carruthers*, 3 Esp. 248; *Williams v. Keats*, 2 Stark. 290; *Brown v. Leonard*, 2 Chitty, 120; *Dolman v. Orchard*, 2 C. & P. 104, in which three last cases, however, there was a continual holding out. See, as to ordering such a bill to be delivered up, *Ryan v. Mackmath*, 3 Bro. C. C. 15.

time, viz., notice of the dissolution or the making of the note, effect must be given to the presumption that the instrument was made and issued on the day it bore date, unless some reason to the contrary can be shown (*p*).

Torts after dissolution.—A partner who retires and does not give sufficient notice, exposes himself to the risk of being sued for torts committed subsequently to his retirement by his late co-partners or their agents; and in the absence of proof of the true state of things he would be held liable for them (*q*).

Case of dormant partner.—Moreover, if a dormant partner is known to certain individuals to have been a partner, he is as to them no longer in the situation of a dormant partner, and must therefore give them notice of his retirement if he would free himself from liability in respect of the future transactions between them and his late partners (*r*).

Importance of notifying dissolution.—It is obvious therefore, that on the dissolution of a firm or the retirement of a partner, it is of the greatest importance to notify the fact; and each partner has a right to notify it.

Each partner has a right to notify it.—If his co-partners prevent him from exercising that right, they will be compelled to do what may be necessary to enable notice to be given, *e.g.*, to sign advertisements for publication in the “Gazette” (*s*).

***Effect of notice of dissolution.**—Subject to two [*215] exceptions, which will be examined hereafter, notice of dissolution of a firm or the retirement of a partner duly given, determines the power previously possessed by each partner to bind the others. Hence, after the dissolution of a firm or the retirement of a member and notification of the fact, no member of the previously existing firm is, by virtue of his connection therewith, liable for goods supplied to any of his late partners subsequently to the notification (*t*); nor

(*p*) See *Anderson v. Weston*, 6 Bing. N. C. 296.

(*q*) *Stables v. Eley*, 1 Car. & P. 614. In this case such proof was given, and the defendant was nevertheless held liable, on the ground of holding out. This, however, was a wrong application of that doctrine. See *ante*, p. 47, and Pollock Dig. 25, ed. 3.

(*r*) *Farrar v. Defflme*, 1 Car. & K. 580. See, too, *Evans v. Drummond*, 4 Esp. 89, and *Carter v. Whalley*, 1 B. & Ad. 14.

(*s*) *Hendry v. Turner*, 32 Ch. D. 355; *Troughton v. Hunter*, 18 Beav. 470.

(*t*) *Minnit v. Whinery*, 5 Bro. P. C. 489.

is he liable on bills or notes subsequently drawn, accepted, or indorsed by any of them in the name of the late firm (*u*); even although they may have been dated before the dissolution (*x*); or have been given for a debt previously owing from the firm (*y*) by the partner expressly authorised to get in and discharge its debts (*z*).

Cases in which notice is immaterial.—There are, it is true, cases to be met with in which notwithstanding a dissolution and notice, a bill or note in the name of the firm has been held to bind those who were members thereof prior to the dissolution; but in each of these cases there was some circumstance taking it out of the ordinary rule. In *Burton v. Issitt* (*a*), the continuing partner had authority to use the name of the retired partner in the prosecution of all suits for the recovery of partnership property. This was held to authorise the giving of a promissory note for sixpences, payable under the Lords' act, and the retired partner was therefore held bound by note given by his late partner in payment of those sixpences. In *Smith v. Winter* (*b*), the continuing partner had express permission to use the name of his late partner, who was therefore justly held liable on a bill given in the name of the old firm after his retirement.

[*216] The only case *indeed of this description which presents any difficulty, is *Lewis v. Reilly* (*c*). There two partners drew a bill payable to their own order, and afterwards dissolved partnership. One of them then indorsed the bill in the name of both to the plaintiff who knew of the dissolution. It was held, in an action by him against both partners, that he was entitled to recover on the bill, and that it was immaterial whether he knew of the dissolution or not. The precise ground of this decision does not distinctly appear. The Court seems to have proceeded on the supposition that an indorsement by one of several payees in the name of all is sufficient; but the writer has been unable to find any previous authority for such a doctrine, save where

(*u*) *Paterson v. Zachariah*, 1 Stark. 71; *Abel v. Sutton*, 3 Esp. 108; *Spenceley v. Greenwood*, 1 Fos. & Fin. 297.

(*x*) *Wrightson v. Pullan*, 1 Stark. 375; s. c. *Wright v. Pulham*, 2 Chitty, 121.

(*y*) *Kilgour v. Finlyson*, 1 H.

Blacks. 156; *Dolman v. Orchard*, 2 Car. & P. 104.

(*z*) *Kilgour v. Finlyson*, 1 H. Blacks. 156. See *Lewis v. Reilly*, *infra*, note (*c*).

(*a*) 5 B. & A. 267.

(*b*) 4 M. & W. 454.

(*c*) 1 Q. B. 349.

the indorsers are partners, which in the case in question they were not, as the plaintiff was found by the jury to have known. The case is certainly anomalous and requires reconsideration (*d*).

Exceptions to rule. — The exceptions alluded to above as qualifying the rule that the agency of each partner is determined by dissolution (or retirement) and notice are —

When a partner continues to hold himself out. — First, where a partner who has retired and notified his retirement, nevertheless continues to hold himself out as a partner; and secondly, where what is done only carries out what was begun before.

1. If a partner retires and gives notice of his retirement, and he nevertheless allows his name to be used as if he were still a partner, he will continue to incur liability on the principle of holding out, explained in an earlier part of this treatise.¹ In *Williams v. Keats* (*e*), after a partner had retired, and after notice thereof had been given by advertisement, a bill was accepted by his co-partner in the names of himself and late partner. The names of both still remained painted up over their late place of business, and Lord Ellenborough held that the partner who had retired was liable on this bill notwithstanding the advertisement; for there was no evidence to show * that the plaintiff in [*217] fact knew of the dissolution (*f*).

Effect of not preventing use of name. — Upon this, however, it is to be observed that the only evidence that the retired partner authorised the continued use of his name, was the fact that he had not prevented it. Now, authorities are not wanting to show that if a partner retires, and notice of his

(*d*) See Story on Bills, § 197, and *Abel v. Sutton*, 3 Esp. 108. The cases go further than is suggested in *Garland v. Jacomb*, L. R. 8 Ex. 220, for the notice of dissolution is what creates the difficulty. See *infra*, p. 220, note (*s*).

(*e*) 2 Stark. 290. See, too, *Dolman v. Orchard*, 2 Car. & P. 104; *Emmet v. Butler*, 7 Taunt. 600.

(*f*) See, as to this, *Brown v. Leonard*, 2 Chitty, 120, *infra*.

¹ This form of the notice is not important, but its substance must be a complete repudiation of further responsibility, and it must be *bonâ fide* and acted upon; mere notice followed by continued dealing, or permitted use of retiring partner's name, being of no avail. *Elterson v. Leeds*, 97 Ind. 336; s. c. 49 Am. Rep. 458; *Freeman v. Falconer*, 44 N. Y. Sup. Ct. 132; *Speer v. Bishop*, 24 Ohio St. 598.

retirement is given by advertisement, he will not continue to incur liability by the acts of his co-partners, simply because they continue to carry on business in the old name, and he does not take steps to stop them (*g*). His forbearance in this respect does not necessarily amount to an authority to use his name as before; and unless his name is used by his authority he is not liable on the ground that he holds himself out as a partner (*h*).

Principle of Williams v. Keats correct.—But although it may be doubtful whether in *Williams v. Keats* there was a sufficient holding out, it is clear that if a partner retires and does still hold himself out as a partner, this is in fact signifying that he is willing to incur the responsibilities of a partner for the sake of those with whom his name is associated; and therefore he will continue to be answerable for their conduct, even to persons dealing with them with knowledge of his retirement. This was decided in *Brown v. Leonard* (*i*), in which the plaintiff sued on a promissory note made in the name of Spring, Leonard, and Bush. Before the note was made, Bush had retired from the firm, and the plaintiff, before he took the note, was told by Bush that he had ceased to be a partner with Leonard and Spring, but that his name was to continue for a certain time. Bush was held liable on the note; for, notwithstanding his retirement, his name was continued, and with it his responsibility (*k*).

2. **Agency continuing for purposes of winding up.**—It is said that a firm, notwithstanding its dissolution, continues to exist so far as may be necessary for the winding up of its business (*l*). This doctrine requires consideration.

[*218] * No doubt after, as well as before dissolution, each partner can pay, or receive payment of, a partnership

(*g*) See *Newsome v. Coles*, 2 Camp. 617.

(*h*) As to a retiring partner's right to an injunction to restrain the continuing partners from carrying on business in the old name, see *De Tastet v. Bordenave*, Jac. 516; *Webster v. Webster*, 3 Swanst. 490, note; *Lewis v. Langdon*, 7 Sim. 421.

(*i*) 2 Chitty, 120.

(*k*) Bush, however, seems to have undertaken that the notes should be provided for. See the judgment.

(*l*) *Ex parte Williams*, 11 Ves. 5; *Peacock v. Peacock*, 16 ib. 57; *Crawshay v. Collins*, 15 Ves. 227, and 2 Russ. 342; *Wilson v. Greenwood*, 1 Swanst. 480; *Crawshay v. Maule*, ib. 507; *Butchart v. Dresser*, 4 De G. M. & G. 542. N.B.—The *dicta* of Lord Eldon were not made in any case in which the power of one partner to bind the others after a dissolution was before him for decision.

debt; for it is clearly settled that payment by one of several joint debtors, or to one of several joint creditors (*m*), extinguishes the debt irrespectively of any question of partnership. So, again, as regards dealing with the partnership assets, it has been held that the power of a continuing or surviving partner to sell or pledge partnership assets is as extensive as that of a partner in a going concern (*n*). But when questions of a different sort arise, considerable difficulty is experienced, and this difficulty is rather increased than diminished by the loose statement, that a partnership which is dissolved is nevertheless deemed to continue so far as may be necessary for winding up its affairs.

Doctrine not admitted at law.—*Lyon v. Haynes* (*o*) is a strong authority to show that when an unincorporated company is dissolved by a resolution of a meeting competent to dissolve it, the power of a majority of shareholders to bind the minority is at an end; and that even as regards the mode of winding up the concerns of the defunct company, the majority of its shareholders cannot bind either a dissentient minority or absentees.

Other cases.—Other cases, which have already been referred to (*p*), clearly show that after the dissolution of an ordinary partnership, no *one aware of the dis- [*219] solution is entitled on any ground of implied agency to hold the members of the late firm responsible for acts done by each other subsequently to the dissolution; and every one must feel the force of Lord Kenyon's observation in *Abel v. Sutton*, that if the contrary doctrine were to prevail, a man could never know when he was to be at peace and freed from all the concerns of the partnership.

Extent of the doctrine.—The doctrine now in question can-

(*m*) i.e., if they are not trustees. Payment to one of several trustees is no discharge, *Webb v. Ledsam*, 1 K. & J. 385.

(*n*) See *Fox v. Hanbury*, Cowp. 445; *Smith v. Stokes*, 1 East, 363; *Smith v. Oriell*, ib. 368; *Harvey v. Crickett*, 5 M. & S. 336; *Morgan v. Marquis*, 9 Ex. 145; *Butchart v. Dresser*, 4 De G. M. & G. 542; *Re Clough*, 31 Ch. D. 324.

(*o*) 5 Man. & Gr. 504. The question in this case was whether an action would lie by a shareholder against

directors for not applying the assets of the company as prescribed by a resolution made after the company had been dissolved. It was held that such action did not lie, although the directors had assumed to wind up the company under the authority of the resolution.

(*p*) *Ante*, p. 215, especially *Kilgour v. Finlyson*, 1 H. Blacks. 156, and *Abel v. Sutton*, 3 Esp. 108. See, too, *Pinder v. Wilks*, 5 Taunt. 611.

not, it is submitted, be carried further than this, viz., that notwithstanding dissolution, a partner has implied authority to bind the firm so far as may be necessary to settle and liquidate existing demands, and to complete transactions begun, but unfinished, at the time of the dissolution (*q*). Even *Butchart v. Dresser* (*r*), which goes further than any other case, does not carry the doctrine beyond this. In that case two persons in partnership as sharebrokers contracted to buy shares. Before paying for them they dissolved partnership, and that fact was known to their bankers. After the dissolution one of the partners pledged the shares to the bankers for money to pay for their purchase, and authorised the bankers to sell the shares to indemnify themselves. The other partner contended that this was done without his authority, and that as the bankers knew of the dissolution, they could not retain the shares against him. The Vice-Chancellor, however, held that the partner who pledged the shares had authority, after the dissolution, to complete the contracts previously made by the firm; that he therefore necessarily had authority to raise the funds to pay for the shares in question, and that he had not gone beyond his authority in raising the money by pledging them with the bankers, as he had done. The Lords Justices took the same view. "The general law," it was said, "is clear that a partnership, though dissolved, continues for the purpose of winding up its affairs. Each partner has, after and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of [*220] the *partnership for partnership purposes as he had during the continuance of the partnership. This must necessarily be so. If it were not, at the instant of the dissolution it would be necessary to apply to this Court for a receiver in every case, although the partners did not differ on any one item of the account."

Observations on *Butchart v. Dresser*. — It is to be observed that in *Butchart v. Dresser*, nothing was done except for the purpose of completing a transaction unfinished at the time of the dissolution. The case did not require the statement of so

(*q*) See in *Lyon v. Haynes*, 5 Man. & Gr. 541, and in *Smith v. Winter*, 4 M. & W. 461, 462; Pollock Dig. 83, ed. 3.

(*r*) 10 Ha. 453, and 4 De G. M. & G. 542. *Re Clough*, 31 Ch. D. 324, was a similar case, only the pledge was for an old debt.

general a proposition as that until the affairs of a partnership are wound up, the agency of each partner continues to be as extensive as if no dissolution had taken place. At the utmost, the case under consideration decides, that in the event of a dissolution, it is competent for one partner to dispose of the partnership assets for partnership purposes (*s*). But neither *Butchart v. Dresser* nor any other case shows that a person who knows that a partnership is dissolved, can hold one partner liable for acts of his late co-partners done subsequently to the dissolution, and without authority; and if in *Butchart v. Dresser* the money to pay for the shares had been raised by a bill, it could not, consistently with prior decisions, have been held that the dissolved firm was liable, either upon the bill itself, or for the money raised by its means.

Before leaving this subject it is necessary to notice *Ault v. Goodrich* (*t*), which is sometimes supposed to go much further than it really does. In that case, two persons, Wilcox the elder and Wilcox the younger, partners as timber merchants, entered into a joint speculation with the plaintiff and another in the purchase and sale of some trees. Wilcox the younger had the chief management of the affair, and before the adventure was closed, the two Wilcoxes dissolved partnership. Wilcox the younger seems to have misapplied some of the monies received by him on the joint account, and it was considered clear that Wilcox the elder was responsible for the *dealings and transactions of Wilcox the [*221] younger during the continuance of their partnership. It was also considered that as there was no evidence of any new agreement between any of the parties upon the dissolution of partnership between the Wilcoxes, the other parties to the adventure were to be treated as having continued to rely on the joint responsibility of the two Wilcoxes, in respect of the dealings of Wilcox the younger. Wilcox the elder was accordingly declared to be responsible for the conduct of Wilcox the younger after the dissolution.

Observations on *Ault v. Goodrich*.—Upon this case it may be observed; first, that the facts are not satisfactorily stated;

(*s*) *Qu. if Lewis v. Reilly*, 1 Q. B. 349, and *ante*, p. 216, can be supported on this principle? Lord Denman's judgment seems to have proceeded

on it. But see *Smith v. Winter*, 4 M. & W. 454.

(*t*) 4 Russ. 430.

and, secondly, that the judgment leads to the inference, that the responsibility of Wilcox the elder for the conduct of Wilcox the younger, did not turn upon the circumstance that they were partners, but upon the circumstance that they were jointly entrusted with the management of the tree speculation. In this view of the case it was obviously immaterial whether the Wilcoxes had dissolved partnership or not.

Notice in case of retirement of dormant partner.—**What amounts to notice of dissolution.**—It has been already seen that when a dormant partner retires, he need give no notice of his retirement in order to free himself from liability in respect of acts done after his retirement (*u*). The reason is that, as he was never known to be a partner, no one can have relied on his connection with the firm, or truly allege that, when dealing with the firm, he continued to rely on the fact that the dormant partner was still connected therewith.

Notice in case of retirement of ostensible partner.—But when an ostensible partner retires, or when a partnership between several known partners is dissolved, the case is very different; for then those who dealt with the firm before a change took place are entitled to assume that no change has occurred until they have notice to the contrary (*x*). And even those who never had dealings with the firm, and who only knew of its existence by repute, are entitled to assume that it still exists until something is done to notify publicly that it exists no longer (*y*).

Old customers entitled to special notice.—An old [*222] customer, however, is entitled to a more *specific notice than a person who never dealt with the firm at all (*z*); and in considering whether notice of dissolution or retirement is or is not sufficient, a distinction must be made according as the person sought to be affected by notice was or was not a customer of the old firm.¹

(*u*) *Ante*, p. 212.

(*y*) *Parkin v. Carruthers*, 3 Esp.

(*x*) See *per* Lord Selborne in *Scarff v. Jardine*, 7 Asp. Ca. 349.

348.

(*z*) *Graham v. Hope*, Peake, 154.

¹ Notice need not necessarily be given by publication to protect a retiring partner. Notice in any other public or notorious manner may be considered on the question of notice. *Lovejoy v. Spafford*, 3 Otto, 430, 23 L. ed. 851 and note. And where notice was so generally communicated to the business men of the place where claimant resided as to be likely to come to his knowledge, evidence of that fact is admissible. *Lovejoy v. Spafford*, *supra*.

Acts of a partner in the name of the firm after dissolution, within the

When a known partner retires, or a partnership is dissolved, notice of the fact is usually given to the world at

scope of the business of the firm, will bind the firm as to customers of the old firm who had no knowledge of the dissolution, or of the powers of the retiring partner under special arrangement for a dissolution, or a settlement by the partners. *Price v. Towsey*, 3 Litt. 423; s. c. 14 Am. Dec. 81; *Little v. Clarke*, 36 Penn. St. 114; *Zollar v. Janvrin*, 47 N. H. 324; *Simonds v. Strong*, 24 Vt. 642; *Martin v. Searles*, 28 Conn. 43; *Davis v. Keyes*, 38 N. Y. 94; *Tudor v. White*, 27 Tex. 584; *Williams v. Bowers*, 15 Cal. 321; *Uhl v. Harvey*, 78 Ind. 26. And the retiring partner is himself liable for contracts made with customers, unless they had notice of his withdrawal. *Southern v. Grim*, 67 Ill. 106; *Pope v. Risley*, 23 Mo. 185; *Pecker v. Hall*, 14 Allen, 532; *Buffalo City Bank v. Howard*, 35 N. Y. 500; *Speer v. Bishop*, 24 Ohio St. 598; *Denman v. Dosson*, 19 La. Ann. 9.

Where a firm held property as bailee, a retiring partner who gave notice to the bailor to remove it relieved himself from liability for subsequent loss. *Winston v. Taylor*, 28 Mo. 82. Otherwise where goods had been consigned to the firm. *Briggs v. Briggs*, 15 N. Y. 471; *Holden v. McFaul*, 21 Mo. 215.

A note given in the name of a firm to a new customer does not bind a retired partner, though no notice was given. *Farmers' Bank v. Green*, 30 N. J. L. 316; *Dickinson v. Dickinson*, 25 Gratt. 321.

Notice by publication held sufficient as to persons who had not previously dealt with the firm in *Lansing v. Gaine*, 2 Johns. 300; *National Bank v. Norton*, 1 Hill, 572; *Vernon v. Manhattan Co.*, 22 Wend. 183; *Prentiss v. Sinclair*, 5 Vt. 149; *Nott v. Douming*, 6 La. 680.

Where members of a partnership, believing the firm to be solvent, agreed to pay a retiring member a fixed sum for his interest, and the new firm borrowed money on its notes to pay that sum and debts of the old firm, it was held on the failure of the new firm that the holders of these notes could not charge the retiring partner or the old firm with the money loaned on their notes. *Penn. National Bank*, 114 U. S. 376, 29 L. ed. 168.

The liability of partners for future acts or contracts within the scope of the partnership business terminates at the dissolution of the partnership, however effected, as to all who are duly notified of the dissolution or have actual knowledge of it. Such notice or knowledge is necessary in all cases except when the partnership is dissolved by death or by operation of law, as by war or bankruptcy, and except as to dormant partners, not known to the particular creditor to be partners. A tax is not a contract that a retiring partner need give notice against. *Washburn v. Walworth*, 133 Mass. 499. Nor need he notify against the giving of a guaranty by one of the firm. *Spurck v. Leonard*, 9 Ill. App. 174. Nor against continued occupation of premises after termination of lease during the partnership. *James v. Pope*, 19 N. Y. 324. See also *Whitman v. Leonard*, 3 Pick. 177; *Ellis v. Bronson*, 40 Ill. 455; *Lansing v. Gaine*, 2 Johns. 300; *Hicks v. Russell*, 72 Ill. 230; *Chamberlain v. Dow*, 10 Mich. 319; *Gale v. Miller*, 54 N. Y. 536; *Cregler v. Durham*, 9 Ind. 375; *Birks v. French*, 21 Kan. 238; *Taylor v. Young*, 3 Watts, 339; *Maier v. Canavan*, 8 Daly, 272; *King v. Barbour*, 70 Ind. 35; *Gardner v. Conn*, 34 Ohio St. 187; *Turnbow v. Broach*, 12 Bush, 455; *Elterson v. Leeds*, 97 Ind. 336; s. c. 49 Am. Rep. 458, *Thurber v. Corbin*, 51 Barb. 216; *Preston v. Foellinger*, 24 Fed. Rep. 680; *Nussbaumer v. Becker*, 87 Ill. 281; *Bristol v. Sprague*, 8 Wend. 423; *Chemung Bank v. Bradner*, 44 N. Y. 680; *City Hall National Bank v. Phelps*, 16 Hun, 158; *Pratt v. Page*, 32 Vt. 13; *Benton v. Chamberlain*, 23 id. 711; *Whitesides v. Lee*, 1 Scam. 548; *Lane v. Tyler*, 49 Me. 252; *Robb v. Mudge*, 14 Gray, 534; *Phillips v. Nash*, 47 Ga. 218; *Kelley v. Hurlburt*, 5 Cow. 534; *Deford v. Rey-*

large by advertisement, and to old customers by some special communication.

nolds, 36 Penn. St. 325; *Scott v. Colmesnil*, 7 J. J. Marsh. 416; *Park v. Wooten*, 35 Ala. 242; *Kennedy v. Bohannon*, 11 B. Mon. 118; *Merrit v. Pollys*, 16 id. 355; *Schorten v. Davis*, 21 La. Ann. 173; *Grady v. Robinson*, 28 Ala. 289; *Woodruff v. King*, 47 Wis. 261; *Princeton &c. Turnpike Co. v. Gulick*, 16 N. J. L. 161.

Most of the cases of notice of dissolution by retiring partners arise with reference to former customers of the firm. *Davis v. Allen*, 3 N. Y. 168; *Nicholson v. Moog*, 65 Ala. 471; *Holdane v. Butterworth*, 5 Bosw. (N. Y.) 1; *Brisban v. Boyd*, 4 Paige, 17; *Van Eps v. Dillaye*, 6 Barb. 244; *Pringle v. Leverich*, 97 N. Y. 181; s. c. 49 Am. Rep. 522; *Williams v. Bowers*, 15 Cal. 321; *Huntington v. Potter*, 32 Barb. 300; *Ranson v. Loyless*, 49 Ga. 471; *Southwick v. McGovern*, 28 Iowa, 533; *Reilly v. Smith*, 16 La. Ann. 31; *Amidown v. Osgood*, 24 Vt. 278; *Schlater v. Winpenny*, 75 Penn. St. 321; *Streecker v. Conn*, 90 Ind. 469.

In *White v. Tudor*, 24 Tex. 639, there was nothing in the evidence from which the inference could be drawn that the plaintiff Tudor did *not* know of the dissolution before the execution of the note sued upon. *Laird v. Ivens*, 45 Tex. 621. The notice may be implied from circumstances, but as to persons who have been in the habit of dealing with the firm it is requisite that actual notice be brought home to them. *Collyer, Partn.* §§ 533, 534; 3 *Kent's Comm.* 66, 67.

In *Rose v. Coffield*, 53 Md. 18, it seems to be decided that a single transaction with a co-partnership giving it credit is a sufficient dealing with it to entitle the party to special notice of the dissolution before his right to trust the firm on the representation of one of its members or its regular agent is terminated. In *Wardwell v. Haight*, 2 Barb. 549, two previous transactions were sufficient, one of them cash and the other a credit, paid prior to dissolution. In *Clapp v. Rogers*, 2 Kern. 283, two previous very small credits paid before dissolution were held sufficient, and in this case the Court of Appeals by Denio, J., said "the rule requiring actual notice proceeds upon a general presumption that one giving credit to a mercantile firm does so upon the responsibility of the individual partners, and we cannot annex to it a distinction based upon the amount of credit without destroying that certainty which is essential to its utility."

The rule requiring actual notice to former customers of the firm does not extend to requiring such notice to be given to agents, clerks, and salesmen of those with whom firm dealt for the protection of such agents in their individual capacity. *Richardson v. Snider*, 72 Ind. 425; s. c. 37 Am. Rep. 168.

Upon the question whether a promise to pay, or payment on account, by one partner after dissolution of a note barred by the statute of limitations, will take the debt out of the statute, is decided differently in different states.

In *Cronkhite v. Herrin*, 15 Fed. Rep. 888 (U. S. C. C. W. D. Wis. 1883), it is held that after dissolution one partner has no power to create or continue a debt as against his co-partners, either by express agreement or by partial payments.

The only evidence offered in this case appears to have been that of a partial payment; none that the payee was ignorant of the dissolution. See *Wiley v. State*, 5 N. E. Rep. 884 (Ind. March, 1886).

Until the payee knows of the dissolution, any contract made by one partner within the scope of the partnership business, binds the other partners also. *Pratt v. Page*, 32 Vt. 15; *Pecker v. Hall*, 14 Allen, 532; *Dickinson v. Dickinson*, 25 Gratt. 321; *Page v. Brant*, 18 Ill. 37; *Lovejoy v. Spafford*, 93 U. S. 439; *Sage v. Ensign*, 2 Allen, 245.

Public notices by advertisement.—Public notice given by advertisement in the "Gazette" is sufficient, not only against

A note made by one partner in the name of the firm, after dissolution, binds all partners, unless payee had notice of the dissolution. * *Clement v. Clement*, 69 Wis. 599; *Reppert v. Colvin*, 48 Penn. St. 248. But see *Marlett v. Jackman*, 3 Allen, 287. So a promise to pay, or an acknowledgment of a firm note, if made within the period of limitation. *Clement v. Clement*, *supra*; *Gates v. Fisk*, 45 Mich. 522. See *contra*, that a promise does not. *Tates v. Clements*, 16 Fla. 339. For the Massachusetts doctrine, see *Peirce v. Tobey*, 5 Met. 168; *Faulkner v. Bailey*, 123 Mass. 588; *Sage v. Ensign*, 2 Allen, 245; *Marlett v. Jackman*, 3 id. 287.

"After the dissolution of a partnership, one of the partners gave to a creditor of the firm a note in the firm's name, for a debt contracted before the dissolution in the ordinary course of business of the partnership. The creditors accepted the note before they had any notice of the dissolution, either actual or constructive. The presiding judge ruled that if the giving of notes had been in the ordinary course of their business while the partnership existed, and this note was given to the plaintiffs in the course of such business, and before they had any notice of the dissolution, it bound both partners. As the dissolution was by the voluntary act of the partners, this ruling was strictly accurate." *Pecker v. Hall*, 14 Allen, 532.

After a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. *Bell v. Morrison*, 1 Pet. 351.

The notice may be direct actual notice, such as by one of a firm of bailees to a bailor, that he might come and remove his property, as the partner was retiring, and would not be held responsible further. *Winston v. Taylor*, 28 Mo. 82. Or it may be constructive, such as results from the insertion of a proper notice in the newspapers. *Vernon v. Manhattan Co.*, 22 Wend. 183, and see *Mauldin v. Branch Bank of Mobile*, 2 Ala. 501, in which it was held that notice published in one of the usual advertising gazettes of the place where the business was carried on, and in a fair and usual manner, is not only presumptive, but conclusive evidence of notice.

Where defendant offered to prove that plaintiff was a customer of the firm of S. W. & Co., was frequently in their store, and lived in same neighborhood, and that an advertisement was posted up at the house lately occupied by V. & W., and then by S. W. & Co., stating that the partnership of V. & W. had dissolved, as showing that plaintiff had notice of the dissolution of V. & W. prior to the making of the note sued on. Held, that the evidence should have been received. *Irby v. Vining*, 2 McCord, 379 (S. C.).

That a person dealing with one partner of a dissolved firm, in the name of the firm, knew facts which ought to have put him upon his inquiry as to whether the firm was dissolved, is constructive notice to him. *Smith v. Vanderburg*, 46 Ill. 34; *Dickinson v. Dickinson*, 25 Gratt. 321; *Robinson v. Worden*, 33 Mich. 316; *Spaulding v. Ludlow Woollen Mill*, 36 Vt. 150; *Speake v. Barrett*, 13 La. Ann. 479; *Zollar v. Janvrin*, 47 N. H. 324; *Holt v. Simmons*, 16 Mo. App. 97.

Dropping his name from published list of directors of a firm called the Titusville Savings Bank, is not such a fact. *Clark v. Fletcher*, 96 Penn. St. 416. A new change of firm's name, which leaves F.'s name in it, is not a fact from which F.'s withdrawal is to be presumed. *Howe v. Thayer*, 17 Pick. 91.

Mailing a statement of dissolution to a former customer of the firm is evidence of notice to him, but is not actual notice. *Eckerly v. Alcorn*, 62 Miss. 228; *Austin v. Holland*, 69 N. Y. 571; s. c. 25 Am. Rep. 246; *Kenney v. Altwater*, 77 Penn. St. 34.

all who can be shown to have seen it, but also as against all who had no dealings with the old firm, whether they saw it

That one was a regular subscriber for a paper in which the notice of dissolution appeared, and during the whole period in which it appeared, is not conclusive in law of notice to him. See *Mauldin v. Branch Bank of Mobile*, 2 Ala. 501; *Treadwell v. Wells*, 4 Cal. 260.

Notice of the dissolution may be inferred from its *notoriety*, and if the severance of the partnership is made as notorious as its existence was, it would seem, upon principle, that this is all that can be required. *Mauldin v. Branch Bank of Mobile*, 2 Ala. 501; *Mitchum v. Bank of Kentucky*, 9 Dana, 166; *Solomon v. Kirkwood*, 55 Mich. 256; *Lovejoy v. Spafford*, 93 U. S. 430; 23 L. ed. 851; *Holdane v. Butterworth*, 5 Bosw. (N. Y.) 1; *Treadwell v. Wells*, 4 Cal. 260; *Clapp v. Upson*, 12 Wis. 492; *Shaffer v. Snyder*, 7 S. & R. 503; *Hixon v. Pixley*, 15 Nev. 475. In *Clapp v. Upson*, *supra*, there was a lapse of time, a mob, and a change of *locus* of the business, and these combined were held to put the creditor on his inquiry. *Southwick v. Allen*, 11 Vt. 75; *contra*, *Goddard v. Pratt*, 16 Pick. 412; *Pitcher v. Barrows*, 17 Pick. 361.

Change of name is usually an important factor in proving notice of dissolution. In *Goddard v. Pratt*, 16 Pick. 412, an important and carefully considered case, the Court by Shaw, C. J., decide that where the co-partners in a firm obtained an act of incorporation and transferred all their partnership property to the corporation whose name was not that of the partnership and it made a by-law providing that its business should be carried on in the name of the partnership, if the co-partnership was thereby dissolved, yet the members of it were liable as partners upon contracts subsequently made in the partnership name with third persons having notice of the dissolution. See case of same corporation, *Wiley v. Thompson*, 9 Met. 329; *Newcomet v. Brotzman*, 69 Penn. St. 185; *Holdane v. Butterworth*, 5 Bosw. (N. Y.) 1; *Irby v. Vining*, 2 McCord, 379; *American Linen Thread Co. v. Wortendyke*, 24 N. Y. 550; *Cogswell v. Davis*, 65 Wis. 191; *Simonds v. Strong*, 24 Vt. 642.

Lapse of time is a circumstance from which it may be found that a third person had notice of the dissolution. A note made in the firm name by one partner will not bind a partner who retired eleven years before the note was issued. *Farmer's Bank v. Green*, 30 N. J. L. 316.

That the partnership had been dissolved for over two years before the note sued on was given, during which time the defendants had been separately in business in different streets, each under his individual name, would justify the jury's finding that plaintiff had notice of the dissolution. *Coddington v. Hunt*, 6 Hill (N. Y.) 595. In *Simonds v. Strong*, 24 Vt. 642, two years were not sufficient. In *Princeton & Co. v. Gulick*, 16 N. J. L. 161, one year was insufficient. In *Treadwell v. Wells*, 4 Cal. 260, four months was considered long enough to put a reasonable man on his guard. See also *Hixon v. Pixley*, 15 Nev. 475; *Holtgreve v. Wintker*, 85 Ill. 470.

Partnership regularly dissolved in June, 1882. Retiring partner gave no notice. Continuing partner K. used the old firm name of G. A. & Co. For a time in 1882 A., the retiring partner, helped K. in his business and took his place during an illness. K. gave cheques in name of G. A. & Co., and accounts were so made up, and he gave one or more cheques in 1883 in his own name. The name of G. A. on sign had been there for thirty years. During the interval from June, 1882, to September, 1886, the plaintiff had several times pressed K. for payment, and never applied to G. A. until September, 1886. The account sued for was £364 16s. 4d. for meat delivered to K. after the dissolution. Held, that plaintiff could recover. *Brundell v. Alexander*, 12 Victorian L. R. 908.

or not (*a*). But an advertisement in any other paper is no evidence against any one who cannot be shown to have seen it (*b*). If, however, it can be shown that he was in the habit of taking the paper (*c*), that is evidence to go to the jury of his having seen not only the particular paper containing the advertisement, but also the advertisement itself (*d*); and if the jury are satisfied that he saw the advertisement, that will be sufficient, although no advertisement was inserted in the "Gazette" (*e*).

Such notice not indispensable.—An advertisement, moreover, is not indispensable; its place may be supplied by something else. Thus a change in the name of a firm painted on its counting-house, accompanied by a removal of the business of the old firm (for the purpose of winding up), and coupled with announcements of the change by circulars sent to the old customers, was held to be sufficient without any advertisement as against a person who had not been an old customer, and who was not proved to have had any distinct notice (*f*).

*** Special notices.**—As against persons who dealt [*223] with the firm before any change in it took place, an advertisement without more is of little or no value, whether it be in the "Gazette" or elsewhere (*g*). But if notice in point of fact can be established, it matters not by what means; for it has never been held that any particular formality must be observed. If an old customer can be shown to have seen an advertisement, that will be sufficient; and evidence that he took in a certain paper is some evidence that he knew of a dissolution advertised therein (*h*). Again, general notoriety, a change in the name of the firm, and advertisements, coupled with the execution of powers of attorney to the new firm, were held (Bolland, B. *dissentiente*), to warrant the jury in finding knowledge by an old customer

(*a*) *Godfrey v. Turnbull*, 1 Esp. 371; *Wrightson v. Pullan*, 1 Stark. 375; *Godfrey v. Macauley*, 1 Peake, N. P. 209; *Newsome v. Coles*, 2 Camp. 617.

(*b*) *Leeson v. Holt*, 1 Stark. 186; *Boydell v. Drummond*, 2 Camp. 157, and 11 East, 144 *n*.

(*c*) Showing that the paper circulated in his neighborhood goes for

nothing alone. *Norwich and Lowestoft Co. v. Theobald*, M. & M. 153.

(*d*) See *Jenkins v. Blizard*, 1 Stark. 418, where, however, the plaintiff had a verdict; *Rowley v. Horne*, 3 Bing. 2.

(*e*) *Rooth v. Quin*, 7 Price, 193.

(*f*) *M'Iver v. Humble*, 16 East, 169; but see *Gorham v. Thompson*, 1 Peake, N. P. 60.

(*g*) *Graham v. Hope*, Peake, 154.

(*h*) *Ante*, note (*d*).

of a change in the old firm (*i*). So, in the case of bankers, a change in the name of the firm appearing on the face of the cheques used by their customers, has been held sufficient notice to an old customer who had drawn cheques in the new form (*k*).

Stamp on advertisements.—With respect to advertisements, it may be here remarked, that an advertisement of an agreement to dissolve is not admissible in evidence unless stamped; but that an advertisement of an actual dissolution is admissible without a stamp (*l*).

B. *Termination of liability as to past acts.*

Termination of partner's liability in respect of past transactions.—When once it can be shown that liability has attached to any partner, the *onus* of proving that such liability has ceased is upon that partner, or those representing him (*m*). The events which have to be considered with reference to this subject may be reduced to four classes, viz.:—

1. Events over which his creditor has no control, *e.g.*, the death or bankruptcy of the partner.

2. Dealings and transactions between the creditor and the partner whose liability is in question.

[*224] * 3. Dealings and transactions between the creditor and the other members of the firm; and,

4. Lapse of time.

The second of these classes of events does not require special notice. The effect of bankruptcy and death will be examined in a subsequent part of this work. There only remain, therefore, to be considered here the third and fourth classes of events alluded to.

Termination of joint obligations.—The nature of an obligation which is joint, or joint and several, is such that although each person subject to the obligation is responsible for its performance, yet each is not bound to perform it without reference to the question whether it has already been performed by the others. Whether the obligation be joint, or joint and several, it has only to be performed once; and per-

(*i*) Hart v. Alexander, 2 M. & W. 484; 7 C. & P. 746.

(*l*) May v. Smith, 1 Esp. 283; Jenkins v. Blizard, 1 Stark. 418.

(*k*) Barfoot v. Goodall, 3 Camp. 147.

(*m*) See 3 Mer. 619.

formance by any one of the persons obliged is available as a defence to a second demand made against the others (*n*). And not only is a joint, or joint and several, obligation at an end when performed by one of the persons in whom it resides, but whatever extinguishes the right to demand performance of that obligation extinguishes the obligation itself, and discharges all the persons in whom it resided (*o*). But an event which merely disables a creditor from suing one of several persons jointly, or jointly and severally, indebted to him, does not necessarily extinguish the debt. For example, if one of the persons indebted becomes bankrupt and obtains his discharge, although *his* liability is thereby at an end, yet the other persons indebted are not discharged from their obligation to pay (*p*). So a covenant by the creditor not to sue one of several persons liable jointly, or jointly and severally, does not extinguish the creditor's right to obtain payment; its effect only being to give the covenantee a right to be indemnified by the creditor against the *consequences of an exercise of his right (*q*). So, [*225] if the creditor receives from one of several debtors part of the debt, this does not discharge the others from their liability to pay the residue (*r*).

In order to show the application of these principles to the discharge of a partner from liability already incurred by him, it will be convenient to consider the effect of

1. Payment.
2. Release.
3. Substitution of debtors and securities.
4. Lapse of time.

An examination of these subjects will involve an inquiry into the mode in which retired partners and the estates of deceased partners cease to be liable to creditors of the firm to which they belonged.

(*n*) See, as to payment by one, *Watters v. Smith*, 2 B. & Ad. 889; *Thorne v. Smith*, 10 C. B. 659; *Beaumont v. Greathead*, 2 ib. 494.

(*o*) See *Cheetham v. Ward*, 1 Bos. & P. 630; *Ex parte Slater*, 6 Ves. 146; *Ballam v. Price*, 2 Moo. 235; *Cocks v. Nash*, 9 Bing. 341; *Wallace v. Kelsall*, 7 M. & W. 264; *Nicholson v. Revill*, 4 A. & E. 675.

(*p*) 46 & 47 Vict. c. 52, § 30, cl. 4. *Crosse v. Smith*, 7 East, 256; *Noke v. Ingham*, 1 Wils. 89; 1 Wms. Saund. 207, *a*.

(*q*) See *Lacy v. Kinaston*, 1 Ld. Raym. 688; *Dean v. Newhall*, 8 T. R. 168; *Walmesley v. Cooper*, 11 A. & E. 216.

(*r*) See *Watters v. Smith*, 2 B. & Ad. 889.

1. *Payment.*

Payment by one partner of partnership debts.—Payment of a partnership debt by any one partner discharges all the others, if the object of the partner paying was to extinguish the whole debt, or if he made the payment out of the partnership funds (*s*). But if a firm is unable to pay a debt, and one partner out of his monies pays it, but in such a way as to show an intention to keep the debt alive against the firm for his own benefit, this payment by him will be no answer to an action brought against the firm by the creditor suing on behalf of the partner who made the payment (*t*).

Imputation of payment made by one partner with money of firm.—If a partner is indebted on his own account to a person to whom the firm is also indebted, and that partner, with the monies of the firm, makes a payment to the creditor without specifying the account on which it is paid, the payment must be taken to have been made on the partnership account, and must be applied accordingly (*u*).²

[*226] * **Payment by new firm discharges old firm.**—Inasmuch as a payment by A. of B.'s debt on behalf of B., enures to the benefit of B. if the creditor accepts the money and B. does not repudiate the payment (*x*) it follows

(*s*) See the cases cited, *ante*, p. 224, note (*n*).

(*t*) McIntyre v. Miller, 13 M. & W. 725; *infra*, note (*y*).

(*u*) Thompson v. Brown, Moo. & M. 40. See, also, Nottidge v. Prich-

ard, 2 Cl. & Fin. 379, affirming Prichard v. Draper, 1 R. & M. 191.

(*x*) Co. Litt. 207, *a*. See Belsham v. Bush, 11 C. B. 191; Jones v. Broadhurst, 9 C. B. 193, &c.; Kemp v. Balls, 10 Ex. 607; Lucas v. Wilkinson, 1 H. & N. 420.

¹ The cases upon this point are conflicting, and the exceptions to this general principle that payment by one's partner of a partnership debt extinguishes the debt are sufficiently numerous to require discrimination in applying the rules to any given cases. See to the effect that the debt is extinguished. Mason v. Eldred, 6 Wall. 231, 18 L. ed. 783; Dana v. Conant, 30 Vt. 246; Pope v. Nance, 1 Stew. 354; Watts v. Robinson, 32 Ont. Q. B. 362. That it is not: Sheehy v. Mandeville, 6 Cranch, 253, 3 L. ed. 215; Coleman v. Coleman, 78 Ind. 344; Kipp v. McChesney, 66 Ill. 460; Sells v. Hubbell, 2 Johns. Ch. 394; Fulton v. Williams, 11 Cush. 108; Fitch v. McCrimmon, 30 Ont. C. P. 183; Jewell v. Ketchum, 63 Wis. 628; Sinsheimer v. Tobias, 53 N. Y. Sup. Ct. 508.

² See St. Louis Type Foundry Co. v. Wisdom, 4 Lea, 695; Wiesenfeld v. Byrd, 17 S. C. 106; Brown v. Brabham, 3 Ohio, 275; Gale v. Miller, 44 Barb. 420.

that if a firm is indebted, and, by the retirement of the original partners and the introduction of other partners, a wholly new firm is called into existence, a payment by the new firm expressly or impliedly on behalf of the old firm, of the debts contracted by the old firm, will extinguish its debt as between that firm and its creditor. But if there are circumstances showing that the money was paid, not on behalf of the old firm and in discharge of its liability, but as the consideration for a transfer to the new firm of the creditor's right against the old firm, the right of the creditor to sue the old firm will not be extinguished, but can still be exercised for the benefit of the new firm (*y*).

As regards discharge by payment, it is important to bear in mind the general rules relating to the appropriation of payments, and especially the rule in *Clayton's case*. The general rules upon this subject are as follows (*z*):—

1. **General rules as to appropriation of payments.**—Where one person is indebted to another on various accounts, the debtor is at liberty to pay in full whichever debt he likes first (*a*).

2. But a debtor has no right to insist on paying a debt partly at one time and partly at another (*b*); although if he does pay a debt in part and the creditor accepts the payment, the debt is extinguished to the extent of the payment thus made and accepted (*c*).

3. The right of a debtor to appropriate a payment to whichever of several debts he prefers, can only be exercised at the time of payment, not afterwards (*d*).

*4. An appropriation by a debtor at the time of [*227] payment need not be express, but may be inferred from the nature of the debt and from the mode and circumstances of payment (*e*).

5. Where the debtor, having the opportunity so to do (*f*),

(*y*) See *Lucas v. Wilkinson*, 1 H. & N. 420; *McIntyre v. Miller*, 13 M. & W. 725, where one partner paid a debt due from the firm, but had the debt transferred to a trustee for himself.

(*z*) For more detailed information the reader is referred to an article by the author in the *Law Magazine* for August, 1855 (vol. 54, p. 21).

(*a*) *Peters v. Anderson*, 5 Taunt. 596; *Mitchell v. Cullen*, 1 McQ. 190.

(*b*) *Dixon v. Clark*, 5 C. B. 365.

(*c*) As to payments of so much in the pound, see *infra*.

(*d*) *Peters v. Anderson*, 5 Taunt. 596.

(*e*) *Ib.*, and see *infra*, rule 8.

(*f*) This is essential. See *Waller v. Lacy*, 1 Man. & Gr. 54; *Young v. English*, 7 Beav. 10.

makes no appropriation, express or tacit, at the time of payment, the creditor is entitled to appropriate the payment to whichever debt he pleases (*g*).

6. And the creditor may exercise this right at any time he likes (*h*); but when he has once exercised it and given notice of such exercise to the debtor, no different appropriation can be made (*i*).

7. The creditor may exercise his right in appropriating a payment, to a debt barred by the Statute of Limitations rather than to one that is not so barred (*k*); to a simple contract debt rather than to a specialty debt (*l*); to a new rather than to an old debt (*m*); to a debt not guaranteed rather than one that is (*n*); and to a debt not bearing interest rather than to one which does (*o*). But the debt must be one which is, or if not barred by time would be, enforceable by legal proceedings (*p*); and one which exists at the time the payment was made (*q*); and one which is then ascertained in amount (*r*); and one which is owing by the debtor and not by other persons (*s*).

[*228] * 8. In the absence of evidence to the contrary, an appropriation by the debtor is inferred, and the right of the creditor to appropriate differently is excluded in the following amongst other cases:—

(*a*) Interest is presumed to be paid before principal (*t*).

(*b*) The earlier items of one entire account are presumed to be paid before the later items of the same account (*u*).

(*g*) See *Simson v. Ingham*, 2 B. & C. 65, and the other cases cited in the next few notes.

(*h*) *Phillpotts v. Jones*, 2 A. & E. 41; *Mills v. Fowkes*, 5 Bing. N. C. 455.

(*i*) *Simson v. Ingham*, 2 B. & C. 65. See, as to representations made by the creditor, *Wickham v. Wickham*, 2 K. & J. 478.

(*k*) *Mills v. Fowkes*, 5 Bing. N. C. 455; *Williams v. Griffiths*, 5 M. & W. 300; *Nash v. Hodgson*, Kay, 650. Such an appropriation, however, does not amount to an admission by the debtor that the barred debt is due, and consequently does not take that debt out of the statute; see the last three cases.

(*l*) *Peters v. Anderson*, 5 Taunt. 596.

(*m*) *Ib.*

(*n*) *Kirby v. Duke of Marlboro'*, 2 M. & S. 18; *Williams v. Rawlinson*, 3 Bing. 71; *Pease v. Hirst*, 10 B. & C. 122; *Re Sherry*, 25 Ch. D. 692. Compare *Kinnaird v. Webster*, 10 Ch. D. 139.

(*o*) *Chase v. Cox*, Freem. 261; *Manning v. Westerne*, 2 Vern. 606.

(*p*) *Wright v. Laing*, 3 B. & C. 165.

(*q*) *Hammersley v. Knowlys*, 2 Esp. 666.

(*r*) *Goddart v. Hodges*, 1 Cr. & M. 33.

(*s*) See *infra*, rule 8 (*d*).

(*t*) *Bower v. Marris*, Cr. & Ph. 351; *Thompson v. Hudson*, 10 Eq. 497; *Warrant Finance Co.'s Case*, 4 Ch. 643.

(*u*) *Clayton's case*, 1 Mer. 585, noticed *infra*.

(c) Money coming to the hands of a creditor by the realisation of a particular security is presumed to be appropriated to the debt thereby secured (x).

(d) Money belonging to one person is presumed to have been paid in discharging his own and not another person's debt; and where a person fills several characters, the character in which he held the money which he paid, *primâ facie* determines the debt to which the payment must be appropriated (y).

(e) A dividend of so much in the pound on several debts is presumed to be paid in respect of them all, and must be applied accordingly (z).

Rule in Clayton's case.—Of these rules the most important with reference to the subject-matter of the present treatise is that which is known as the rule in Clayton's case (a), that where there is one single open current account between two parties, every payment * which cannot be [*229] shown to have been made in discharge of some particular item, is imputed to the earliest item standing to the debit of the payer at the time of payment. If, therefore, a customer of a firm of bankers has funds standing to his credit at the time they dissolve partnership, and his account is continued by their successors, they taking new deposits and honouring his drafts as if no change had occurred, and blending the accounts, then the payments first made by the new firm will be deemed to have been made in liquidation of the earliest item on the credit side of the customer's account, viz., the balance due to him at the time of the dissolution; and consequently, if, proceeding on this principle, that balance is liquidated, the customer has no

(x) *Brett v. Marsh*, 1 Vern. 468; *Young v. English*, 7 Beav. 10; *Pearl v. Deacon*, 24 Beav. 186, and 1 De G. & J. 461.

(y) *Burland v. Nash*, 2 Fos. & Fin. 687; *Nottidge v. Prichard*, 2 Cl. & Fin. 379; *Goddart v. Cox*, 2 Str. 1194; *Thompson v. Brown, Moo. & M.* 40; *Bowes v. Lucas*, Andr. 55. Compare *Sterudale v. Hankinson*, 1 Sim. 393, and *Beale v. Caddick*, 2 H. & N. 326, where the rule in Clayton's case also applied.

(z) *Thompson v. Hudson*, 6 Ch. 320; *Hobson v. Bass*, ib. 792; *Raikes*

v. Todd, 8 A. & E. 846; *Thornton v. McKewan*, 1 Hem. & M. 525; *Paley v. Field*, 12 Ves. 435.

(a) 1 Mer. 572. See, in addition to the cases cited in the text as illustrating the rule in question, *Ex parte Randleson*, 2 D. & Ch. 534; *Copland v. Toulmin*, 7 Cl. & Fin. 349; *Brown v. Adams*, 4 Ch. 764; *Laing v. Campbell*, 36 Beav. 3; and as to the application of the rule to trust monies mixed with other monies, *Re Hallett's Estate*, 13 Ch. D. 696; *Pennell v. Deffell*, 4 De G. M. & G. 372.

claim against the old firm in respect of his account with them.¹

This doctrine is of great importance in questions relating to the discharge of retired and deceased partners.

Effect of rule in the case of retired and deceased partners.—The application of the rule in question will discharge from liability the estates of deceased partners (*b*); the estates of sole traders if their businesses have been carried on by others with any break (*c*); and retired partners, whether known (*d*) or dormant (*e*). Moreover, the discharge of the deceased or retired partner being the consequence of the payment of his former creditor, the discharge does not depend on the knowledge of the creditor of the change which has taken place in the firm (*e*). It is true that if the creditor had known of the change he might have objected to continue to deal with the continuing or surviving partners unless the old and new accounts were kept distinct; but this circumstance does not entitle him to treat his old debt as still unpaid when he has in fact dealt on the footing of there being only one continuous account, and when on this footing he has been paid his old debt (*f*).

[*230] * **Application of rule to all single running accounts.**—

The rule in Clayton's case applies to all accounts of the nature of one entire debit and credit account, without

(*b*) As in Clayton's case, 1 Mer. 572.

(*c*) Sterndale v. Hankinson, 1 Sim. 393; Smith v. Wigley, 3 Moo. & Sc. 174.

(*d*) Hooper v. Keay, 1 Q. B. D. 178.

(*e*) Brooke v. Enderby, 2 Brod. &

Bing. 70; Newmarch v. Clay, 14 East, 239.

(*f*) See the last note. The creditors in those cases did not know of the changes in the firms with which they dealt. See, also, Merriman v. Ward, 1 J. & H. 371.

¹ Where nearly all the partners in a firm that had become largely indebted to the plaintiffs became stockholders in a corporation that took over their property and business and assumed their debt, and the plaintiffs transferred to the account of the corporation their claim against the firm, and continued dealings with the corporation, in the course of which it paid the plaintiffs large sums of money, exceeding the balance due from the partnership, and the business so continued for over two years with unusual notoriety and no pretence of fraud, and then the corporation failed, held that the plaintiffs could not revive their claim against the partnership. *Whitwell v. Warner*, 20 Vt. 425. See also *Allen v. Frumet Min. & Smelt. Co.*, 73 Mo. 688.

In *Birkett v. McGuire*, 7 Ont. App. R. 53 (reversing 31 Ont. C. P. 430), the retiring partner was held liable for partnership debts to plaintiffs who had for three years dealt only with the continuing partner, and after the retiring partner had refused to renew partnership notes, claiming that he was not liable.

reference to any question of partnership, and is available not only by a firm against an old creditor, but also against a firm for the benefit of its debtors.

Discharge of surety.—For example, where a person becomes surety to a firm guaranteeing a debt owing to it by a third party, then, if the debt is an item in an account between this third party and the firm, and is liquidated by general payments with which he is credited, the debt guaranteed will be extinguished, and the surety will be discharged, although upon the whole account there may always have been a balance owing to the firm (*g*). On the other hand if the guaranteed debt is not extinguished by the rule in question, the surety will not be discharged (*h*). Moreover, the rule applies even as between persons who do not know that they are being affected by it, and who, if they did, might take care to exclude its operation (*i*).

Rule applies against the debtor as well as against the creditor.—Further, as a creditor has no right to take the account subsisting between him and his debtor backwards, so as to make himself appear a creditor in respect of the earlier rather than of the later items of the account, so, on the other hand, a debtor, after making general payments in respect of one entire account, is not at liberty to have those payments applied in liquidation of the subsequent rather than of the earlier items (*k*).

Effect on incoming partner.—This has an important bearing on the position of incoming partners; for although they are not liable for debts contracted before they joined the firm, still if such debts and others subsequently contracted are allowed by an incoming partner to *form one [*231] single running account, and payments are made generally in respect of it, those payments, although made with the money of the new firm, will be applied to the old debt,

(*g*) See *Kinnaird v. Webster*, 10 Ch. D. 139; *Bodenham v. Purchas*, 2 B. & A. 39; *Field v. Carr*, 5 Bing. 11; *Pemberton v. Oakes*, 4 Russ. 154; *Toulmin v. Copland*, 3 Y. & C. Ex. 625, and *Copland v. Toulmin*, 7 Cl. & Fin. 350; *Bank of Scotland v. Christie*, 8 Cl. & Fin. 214; *Medewe's Trust*, 26 Beav. 588. Compare *Ex parte Whitworth*, 2 M. D. & D. 164; *City Discount Co. v. Maclean*, L. R. 9 C. P.

692, where, notwithstanding the mode in which the books were kept, the real intention was to keep the second debt separate from the others.

(*h*) *Re Sherry*, 25 Ch. D. 692; *Williams v. Rawlinson*, 3 Bing. 71.

(*i*) *Ante*, note (*f*); *Merriman v. Ward*, 1 J. & H. 371; *Scott v. Beale*, 6 Jur. N. S. 559.

(*k*) *Beale v. Caddick*, 2 H. & N. 329.

and a balance will be left for which the incoming partner will be liable (*l*). But the rule in Clayton's case cannot be insisted on to the prejudice of a new partner without his consent, express or tacit. Without such consent a creditor of the old firm who goes on dealing with the new firm has no right to appropriate a payment made by a new partner to a debt owing by his co-partners, nor to run two distinct accounts together, and treat a general payment as made in respect of the earliest items. *Burland v. Nash* (*m*) may be referred to as an illustration of this. In that case A. succeeded B. in business, and agreed with him to take his debts upon himself; A. then contracted debts of his own to one of B.'s creditors, and A. afterwards made such creditor a general payment on account; it was held that the creditor could not, without A.'s consent, apply this payment in discharge of the debt owing by his predecessor B.

Rule inapplicable where there are distinct accounts.—The rule in Clayton's case, however, applies only to an entire unbroken account, and has no application to cases where one person is indebted to another in respect of several matters, each of which forms the subject of a distinct account.

Right of appropriation in such a case.—In such a case, if the debtor does not appropriate the payment when he makes it, the creditor is at liberty to apply the payment to whichever account he thinks proper (*n*). Moreover, when a change takes place in a firm by the retirement or death of a member, a creditor of the firm is under no obligation to assent to a carrying over of his debt, so that it shall form the first item in a fresh account with the new firm. He is at liberty to keep the accounts with the two firms distinct, and if he does so, payments made generally by the new firm will not [*232] necessarily *go by virtue of the rule in Clayton's case, in liquidation of the debt owing by the old firm. A remarkable illustration of this is afforded by the well-

(*l*) See the last case, and also *Scott v. Beale*, 6 Jur. N. S. 559. This case is badly reported, but it is tolerably plain that the incoming partner was held liable to pay, not the debt due to the plaintiff when the partnership commenced, but the balance of monies due to him on his whole account, and which balance consisted of mon-

ies received by the defendants after the partnership between them was created.

(*m*) 2 Fos. & Fin. 687. Quære whether the evidence did not warrant the inference that the two accounts had been run into one with the consent of the defendant.

(*n*) *Ante*, p. 227.

known case of *Simson v. Ingham* (o). There two country bankers, Benjamin and Joshua Ingham, gave a bond to a London bank, as a security for advances, which it might make on account of the persons constituting the country bank, or either of them, associated or not with any other persons. Benjamin died, and at his death a considerable sum was due to the London bank for advances made to the country bank. The London bank was in the habit of sending in monthly accounts to the country bank. In the month following Benjamin's death the London bank received and paid considerable sums on account of the country bank, and the sums were entered by the London bank in its own books in continuation of the former account between it and the old country bank. No account, however, was sent to the country bank until two months after Benjamin's death; and then two accounts were sent, one of them being an account of receipts and payments prior to his death, and the other being an account of receipts and payments made subsequently thereto. A considerable balance was due to the London bank on the first of these accounts, and to recover this balance an action was brought against Benjamin's representatives. It was contended that his estate was discharged, by virtue of the rule in *Clayton's case*, the London bank having received since his death much more than sufficient to liquidate that balance; but it was held that the rule in question did not apply. The judgment of Mr. Justice Bayley contains such an admirable statement of the principles applicable to such cases that no hesitation has been felt in setting it out at length.

"The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz., that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the *old and new firms in one [*233] entire account, then the payments made from time to time by the surviving partners, must be applied to the old debt. In that case, it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has

produced no alteration whatever. In this case, the partner died in September, 1811. If in the ordinary course of business a monthly account had been sent in, stating the transactions before and after the death of the partner, as forming part of one entire account, and the balance is due from the survivors, in that case the creditor would have been precluded, and would have had no right to have said that the payments made subsequently to the death of the partner should be applied to any but the old account. In fact, the bankers in London did not send in any account after the death of the partner until November, and then they sent in two distinct accounts, one made up to the day of the death of the partner, and the other commencing from that period. At that time, therefore, the bankers in London expressed their dissent from making the whole one entire account. It has been insisted that at that period of time they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account: but entries made by a man in books which he kept for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit. For these reasons, I am of opinion that the plaintiffs were not precluded from applying the payments to the new account, and therefore this award is right."

Right to blend accounts.—The case of *Simson v. Ingham* was decided upon the principle that a creditor of a firm has a right, when a change occurs in the firm, to decide for himself whether the sum due to him from the old firm shall or shall not form an item in his account with the new firm. This principle is further illustrated by the case of *Jones v. Maund (p)*. There, three persons, A., B., and C. were partners, and D. was indebted to them in a sum secured by a covenant and a mortgage. A. and B. died, C. retired, and assigned her interest to E. who, with F., continued the business of the old firm under the old name. D. continued to deal with the new firm, and he made it several payments, more than sufficient to liquidate the debt above mentioned if appropriated thereto. The mortgage had been realised, and the sum arising from it had been applied in part dis-
[*234] charge of * the debt secured by it. There was nothing to show that D.'s debt had been made an item in the account between him and the new firm, and it was consequently held that D. had no right to insist that the pay-

ments made by him generally to the new firm should be applied to the balance due from him on his covenant (*q*).

Transfer of debt from one account to another.—It should be borne in mind with reference to cases of this description, that one partner can bind the firm by assenting to a transfer of a debt, due to or by it, from one account to another (*s*).

Rule in Clayton's case inapplicable where it defeats the intentions of the parties.—The rule in Clayton's case, viz., that in current accounts it is presumably the sum first paid in that is first drawn out, or in other words, that presumably it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side, is a rule based on the presumed intention of the parties (*t*). It is not, as is sometimes represented, a rule of law obtaining independently of their will; and consequently, if it can be shown that some other appropriation was intended, the rule ceases to be applicable. An intention to appropriate a payment to a later rather than to an earlier item in the account, may be inferred from the usual course of business between the parties (*u*); from the source from which the money was obtained (*x*); from the security to meet which the payment was made (*y*); from the fact that the earlier item was secured and intended to be kept separate from the * others (*z*); from the fact that the payment was a [*235] dividend on all debts (*a*); from the representations of the parties (*b*); and from other circumstances (*c*).

(*q*) The case was decided on demurrer, and according to the report, it was held that the balance due on the covenant could not be considered as liquidated, unless it could be shown that it had, *with C.'s assent*, been made an item in the account between D. and the new firm. But quære what C. had to do with it, she having assigned all her interest in the debt to the new firm? Did she not thereby authorise the new firm to deal with the debt as it liked? See *Pemberton v. Oakes*, 4 Russ. 154.

(*s*) *Ante*, pp. 230, 231; *Beale v. Caddick*, 2 H. & N. 326.

(*t*) *Re Hallett's estate*, 13 Ch. D. 696; *Wilson v. Hurst*, 4 B. & Ad. 767, *per Lord Denman*. In *Copland v.*

Toulmin, 7 Cl. & Fin. 349, there was evidence to show an agreement for a different appropriation, but it was not deemed sufficient to exclude the rule.

(*u*) *Taylor v. Kymer*, 3 B. & Ad. 320; *Lysaght v. Walker*, 5 Bli. N. S. 1.

(*x*) *Stoveld v. Eade*, 4 Bing. 154; *Thompson v. Brown*, Moo. & M. 40.

(*y*) *Newmarch v. Clay*, 14 East, 240.

(*z*) *City Discount Co. v. Maclean*, L. R. 9 C. P. 692. See *ante*, p. 230.

(*a*) *Ante*, p. 228.

(*b*) *Wickham v. Wickham*, 2 K. & J. 478; *Merriman v. Ward*, 1 J. & H. 371.

(*c*) See *Henniker v. Wigg*, 4 Q. B. 792. Compare *Re Boys*, 10 Eq. 467.

An instructive case on this head is *Wickham v. Wickham* (*d*), which in substance was as follows:—A firm of Finch and Sons, as agents of the plaintiffs, supplied goods to the firm of Smith and Willey upon the terms that the latter should become debtors to the plaintiff in respect of such goods. Finch and Sons also supplied Smith and Willey with other goods on their own behalf. In the accounts between Finch and Sons and Smith and Willey, no distinction was made between goods supplied by Finch and Sons on their own behalf, and those which they supplied as agents of the plaintiffs. Smith and Willey made payments generally on account; and applying the rule in *Clayton's* case, nothing was due from Smith and Willey in respect of the goods supplied to them on behalf of the plaintiffs. However, Edward Finch was a partner in both firms, and representations were made to the plaintiffs by the firm of Finch and Sons to the effect that a large debt was due to the plaintiffs from the firm of Smith and Willey, and Finch and Sons undertook that Edward Finch should use his influence as a partner in the firm of Smith and Willey, to secure the reduction of such debt. Upon the faith of this representation and undertaking, the plaintiffs forebore to sue Smith and Willey. It was held, that the firm of Smith and Willey was precluded from treating its debt to the plaintiffs as liquidated by the payments made by it to the firm of Finch and Sons; for it was not competent to the two firms so to arrange their accounts as to liquidate a debt which a person who was a partner in both firms represented to the plaintiffs as still owing to them.

Application of the rule in cases of fraud.—Upon the same principle, viz., that the rule in *Clayton's* case is founded on the presumed intention of the parties, it follows that it cannot be applied as against a person who is a [*236] *creditor in respect of a fraud committed on him and of which he is ignorant. This in fact was determined in *Clayton's* case itself. For Clayton, in addition to the claim which was held to have been discharged by the operation of the rule noticed above (*e*), had another claim upon *Devaynes' estate*, arising out of a breach of trust com-

(*d*) 2 K. & J. 478. See, too, *Meriman v. Ward*, 1 J. & H. 371.

(*e*) *Ante*, p. 228.

mitted by a fraudulent sale of some exchequer bills, and of which sale he was kept in ignorance. The payments made to Clayton since Devaynes' death were more than sufficient to satisfy both claims; but it was held, that the claim arising out of the concealed sale of the bills was not affected by those payments (*f*). So if one partner fraudulently overdraws his account with the firm and keeps paying money in and drawing money out, so that his fraudulent overdrawing is never discovered, it will not be treated as having been made good so long as there is a balance against him (*g*).

Imputation of payment where debts are owing to a firm and to a member of it. — Before leaving the subject of appropriation of payments it may be as well to advert to a question of some difficulty which arises when a person indebted to a firm, and also to an individual member of it, pays him a sum of money under such circumstances that it cannot be ascertained on account of which debt the payment was made. In such a case ought the payment to be applied in liquidation of the debt due to the partnership, or of that due to the individual member? Pothier (*h*) says that good faith requires that the partner receiving the money, should apply it proportionally to both demands. The writer is not aware of any decision on this subject, but he apprehends that, as between the partner and the debtor, the payment might be applied to either debt at the option of the partner, whilst, as between the partner and his co-partners, good faith would require that the payment should be applied wholly to the partnership debt (*i*).

* 2. Release.

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Release of one partner is a release of the firm. — A release of one partner from a partnership debt discharges all the others (*k*); for where several persons are bound jointly, or jointly and severally, a release of one is a release of them all (*l*).

(*f*) See Clayton's case, 1 Mer. 572-580.

(*g*) Lacey v. Hill, 4 Ch. D. 537.

(*h*) Pothier, "Société," § 121.

(*i*) See Thompson v. Brown, Moo. & M. 40, and Nottidge v. Prichard, 2 Cl. & Fin. 379.

(*k*) Bower v. Swadlin, 1 Atk. 294;

Ex parte Slater, 6 Ves. 146; Cheetham v. Ward, 1 Bos. & P. 630; Cocks v. Nash, 9 Bing. 341.

(*l*) See the last note, and as to joint and several obligations, Co. Lit. 232, *a*; Lacy v. Kinaston, 1 Ld. Raymond, 690; Kiffin v. Evans, 4 Mod. 379.

Covenant not to sue has a different effect.—But in this respect a covenant not to sue differs from a release; for, although where there is only one debtor and one creditor, a covenant by the latter never to sue the former is equivalent to a release, it has been decided on several occasions that a covenant not to sue does not operate as a release of a debt owing to or by other persons besides those who are parties to the covenant (*m*).¹

Releases in form held to be covenants not to sue.—If a release is so drawn as to show that it was intended to enure only for the benefit of the releasee personally, and not to avail even him in an action by the releasor against the releasee, jointly with other people, then persons jointly liable with him in respect of the debt released will not be discharged therefrom. In such a case the deed will itself show that it was not in fact intended to operate as a release.

In *Solly v. Forbes* (*n*) the defendants, Forbes and Ellerman; were partners, and were indebted to the plaintiffs, and had stopped payment. In consideration of a sum paid by Ellerman, the plaintiffs released him from all further demands, but it was declared in the release (to which, however, Forbes was not a party), that nothing therein contained should affect the plaintiffs' rights against Forbes, either separately or as partner with Ellerman, or against the joint estate of the two; and that it should be lawful for the plaintiffs to sue Ellerman, either jointly with Forbes, or [*238] separately, for the purpose of obtaining *satisfaction of their debt, either out of the joint estate of the two, or from Forbes. In an action brought by the plaintiffs against Forbes and Ellerman to recover the debt owing

(*m*) *Clayton v. Kynaston*, 2 Salk. 573; *Lacy v. Kynaston*, 1 Ld. Raymond, 688, and 2 Salk. 575; *Hutton v. Eyre*, 6 Taunt. 289; *Dean v. Newhall*, 8 T. R. 168; *Walmesley v. Cooper*, 11 A. & E. 216; and see *Price v. Barker*, 4 E. & B. 760.

(*n*) 2 Brod. & Bing. 38. See, too, *Price v. Barker*, 4 E. & B. 760; *Thompson v. Lack*, 3 C. B. 540; *Willis v. De Castro*, 4 C. B. N. S. 216; *Bateson v. Gosling*, L. R. 7 C. P. 9.

¹ While a release of one joint debtor operates to release all, if properly executed and for a consideration, (*Evans v. Carey*, 29 Ala. 99; *Wiggin v. Tudor*, 23 Pick. 434,) the effect may be accomplished by releasing one and holding the other by a covenant not to sue, or an agreement to indemnify. *Bank of Chenango v. Osgood*, 4 Wend. 607; *Ruggles v. Patten*, 8 Mass. 480; *Goodnow v. Smith*, 18 Pick. 414; *Kenworthy v. Sawyer*, 125 Mass. 28; *Roberts v. Strang*, 38 Ala. 566.

by them, it was held that this deed was no bar to the action.

Again, in *Hartley v. Manton* (*o*), where a bill was drawn by a firm on, and was accepted by, one partner, it was held that a release of the drawers did not discharge the acceptor; the object of the release being to discharge the joint liability of the firm, but not to affect the several liability of the accepting partner.

Recitals of releases.—In construing releases particular attention must be paid to the recitals; for, however general the operative words of the deeds may be, they will be confined so as not to affect more than the parties appear from the deed itself to have contemplated (*p*).

Removing seal.—If several persons are bound by a bond jointly, or jointly and severally, and their creditor removes the seal of one of them from the bond, all the others are discharged; but if the obligors are only bound severally, then the removal of the seal of one of them does not affect the liability of the others (*q*).

Arrest.—Before arrest for debt was abolished (as it now is except in a few special cases) an arrest of a debtor, followed by a discharge of him by the arresting creditor, was equivalent to a release by the creditor of his debt; whence it followed that if a creditor of a firm obtained judgment against it, and arrested the partners, and then let one of them go, the others were entitled to be discharged from custody (*r*).

Composition in bankruptcy.—If a creditor accepts a composition in bankruptcy in respect of a joint debt, he is not precluded from suing one of the debtors who may be separately liable to him in respect of the same debt (*s*).

* **Receipt in full.**—A receipt given to one partner [*239] in satisfaction of all demands against him, will not discharge his co-partners unless that also was intended (*t*).

(*o*) 5 Q. B. 247.

(*p*) See, for illustration of this rule, *Lindo v. Lindo*, 1 Beav. 496; *Payler v. Homersham*, 4 M. & S. 423; *Simons v. Johnson*, 3 B. & Ad. 175; *Boyes v. Bluck*, 13 C. B. 652; *Lampon v. Corke*, 5 B. & A. 606.

(*q*) See *Collins v. Prosser*, 1 B. & C. 682.

(*r*) *Ballam v. Price*, 2 Moo. 235.

(*s*) *Simpson v. Henning*, L. R. 10 Q. B. 406; *Megrath v. Gray*, L. R. 9 C. P. 216. *Wilson v. Lloyd*, 16 Eq. 60, *contra*, must be considered as overruled on this point; *Cragoe v. Jones*, L. R. 8 Ex. 81, was a case of a surety.

(*t*) *Ex parte Good*, 5 Ch. D. 46,

3. *Substitution of debtors and securities.*

A liability which is originally joint or joint and several, may be extinguished by being replaced by a liability of a different nature: and this may happen in one of two ways, viz., either by an agreement to that effect come to between the parties liable and the person to whom they are liable (*u*); or by virtue of the doctrine of merger, independently of any such agreement.

(a.) *Of substitution by agreement.*

Extinction of liability by substitution of debtors. — In order that one liability may be extinguished by being replaced by another by agreement, it is essential that the person in whom the correlative right resides should be a party to the agreement, or should, at all events, show by some act of his own that he accedes to the substitution.¹ If A., being in-

where one partner was a nominal partner, and not, therefore, liable to indemnify the others.

(*u*) Sometimes called Novation, but nothing is really gained by using this word. See, as to this word, 1 Ch. D. 322, *per* James, L. J.

¹ That the assent of the creditor is necessary to give effect to an agreement by which one party is released and another substituted as debtor, see *Chase v. Vaughan*, 30 Me. 412; *Aiken v. Thompson*, 43 Iowa, 506; *Wild v. Dean*, 3 Allen, 579; *Osborn v. Osborn*, 36 Mich. 48; *Whitwell v. Warner*, 20 Vt. 425.

There is no presumption that payments made by a new firm continuing the business of an old firm are on account of the old firm. *Burns v. Pillsbury*, 17 N. H. 66; *Parmalee v. Wiggenhorn*, 6 Neb. 322. Though where the account of an old firm is carried forward as a part of the account of the new firm, payments may be credited on the old account. *Morgan v. Tarbell*, 28 Vt. 498.

A simple contract debt from A. & B. as partners is extinguished as to B., if the creditor takes a mortgage from A. and gives time. *Loomis v. Ballard*, 7 Ont. Q. B. 366.

In the absence of express agreement to that effect, a creditor taking the note of one partner for a debt of the firm and suing thereon, but failing to recover the amount of the note, is not precluded from afterwards claiming the amount of the note against the partnership. *Carruthers v. Ardagh*, 20 Ont. Chy. 579.

This was a peculiar case of illiterate partners, whose method of signing the firm name was for each to sign his own surname. Time was given on the note in question, which was for a larger amount than the non-signing partner admitted to be due. Dissenting opinion by Blake, V.-C.

One partner gave as security for half the firm's debt a mortgage on his separate estate; the other gave an indorsed note for the other half. The creditor claimed the right to indorse payments subsequently made by the firm on the note alone, until the half secured by it should be paid.

The assignee of the mortgagor was held entitled to have one-half of all sums paid on account of the joint debt credited on the mortgage security. *Moore v. Riddell*, 11 Ont. Chy. 69.

debted to B., transfers his liability to C., and B. does not assent to the transfer, his rights are wholly unaffected: he will neither acquire any right against C. nor lose his former right against A. As regards B. the agreement between A. and C. is *res inter alios acta*, and it does not in any way benefit or prejudice him. But if B. assents to the arrangement come to between A. and C., and adopts C. as his debtor instead of A., then A.'s liability to B. is at an end, and B. must look for payment to C. and to him alone (*x*).

Agreement between partners does not affect creditors.—To apply this to cases of partnership, let it be supposed that a firm of three members, A., B., and C., is indebted to D.; that A. retires, and B. and C. either alone, or together with a *new partner, E., take upon themselves the liabilities of the old firm. D.'s right to obtain payment from A., B., and C. is not affected by the above arrangement, and A. does not cease to be liable to him for the debt in question (*y*). But if, after A.'s retirement, D. accepts as his sole debtors B. and C., or B., C., and E. (if E. enters the firm), then A.'s liability will have ceased, and D. must look for payment to B. and C., or to B., C., and E., as the case may be. When, therefore, a partner has retired, and a creditor of the firm continues to deal with the continuing partners and such other persons, if any, as may have become associated with them in partnership, it is of great importance to ascertain whether the creditor has or has not accepted the new firm as his debtors, in lieu of the old firm. If he has, the retired partner's liability will have ceased, whilst if he has not, it will still continue.

Liability not got rid of by transferring share.—Nothing used to be more common than for promoters of companies to put forward a prospectus in which it was said that all liability on the part of a shareholder would cease on a transfer of his share; but the hope thus held out was as false and delusive as that intended to be raised by the assertion that the liability of the shareholders would be limited to the amount of their shares (*z*). It cannot be too often repeated that, merely by retiring, a partner or a shareholder gets rid

(*x*) See *per* Buller, J., in *Tatlock v. Harris*, 3 T. R. 180.

Dickenson v. Lockyer, 4 Ves. 36; *Cummins v. Cummins*, 8 Ir. Eq. 723.

(*y*) *Smith v. Jameson*, 5 T. R. 601; *Rodgers v. Maw*, 4 Dowl. & L. 66;

(*z*) See *Blundell v. Winsor*, 8 Sim. 613.

of no liability as to past transactions, unless there is some statutory enactment applicable to his case; and the same observation applies to a total dissolution. To use the words of Mr. Justice Heath, "when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partnership continues, and always must continue" (a).

The cases which bear upon the question of discharge by virtue of a substitution by a creditor of one debtor [*241] for another * will be found, notwithstanding some conflict between them, to be all professedly based on the foregoing principles and on a few simple rules, the most important of which are as follows:

1. **Creditors not presumed to discharge outgoing partners.**—There is no *à priori* presumption to the effect that the creditors of a firm do, on the retirement of a partner, enter into any agreement to discharge him from liability (b).

2. **Creditor may agree to look only to continuing partners.**—An agreement by a creditor of several persons, liable to him jointly, to discharge one or more of them, and look only to the others, is not necessarily invalid for want of consideration (c).

3. **Effect of doctrine that a release of one partner is a release of all.**—Except under special circumstances, a creditor who releases one partner discharges all (d). Consequently, if a creditor discharges a retired partner, and acquires no fresh right to obtain payment from the others, either alone or with a new partner, the creditor will be altogether remediless. One test, therefore, by which to determine whether a retired partner has been discharged, is to see whether the creditor has obtained a new right to demand payment; for if he has not, no discharge can possibly be made out by any evidence which fails to establish an extinguishment of the creditor's demand altogether.

Classification of cases.—It is proposed now to examine the cases relating to the liability of retired partners for debts

(a) *Wood v. Braddick*, 1 Taunt. 104. Therefore, partners continue liable on the covenants entered into by them in a lease of the partnership premises, although the firm may have been dissolved since the lease was granted. See *Hoby v. Roebuck*, 7

Taunt. 157; *Graham v. Whichelo*, 1 Cr. & M. 188.

(b) Such an agreement must be proved. See *Benson v. Hadfield*, 4 Ha. 37.

(c) *Lyth v. Ault*, 7 Ex. 669.

(d) *Ante*, p. 237.

incurred before their retirement. They may be conveniently classified thus:—

- A. Cases in which a retired partner has not been discharged;
 - (a) No new partner having been introduced into the firm.
 - (b) Although a new partner has been introduced into the firm.
- B. Cases in which a retired partner has been discharged.

After these cases have been examined, the analogous cases relating to the discharge of the estate of a deceased partner will be noticed.

* CLASS A *a.*—CASES IN WHICH A RETIRED PART- [*242]
NER HAS NOT BEEN DISCHARGED, NO NEW PART-
NER HAVING BEEN INTRODUCED INTO THE FIRM.

Promise to look only to continuing partners.—The strongest cases of this class are *Lodge v. Dicas* (*e*), and *David v. Ellice* (*f*). In each of these a partnership had been dissolved, one member retiring and the other continuing the business, and agreeing to pay the debts of the old firm. In each case the plaintiff knew of the arrangement, and his debt was transferred with his consent to the books of the new firm. In each case, moreover, there was strong evidence to show that the plaintiff had agreed to discharge the retired member, and to look only to the others. But in each it was held that the retired partner continued liable, and that the plaintiff had done nothing to discharge him; and the fact that no person had become liable to the plaintiff who was not so originally, was relied upon by the Court as showing that there was no consideration for the alleged discharge (*g*).

Observations on these cases.—These two cases have been much criticised (*h*), and they certainly went too far; for the proposition that a creditor of a firm cannot, for want of consideration, abandon his right against a retiring partner, and retain it against the others, unless they give some fresh security, has been shown to be erroneous, and it is now exploded (*i*); and there can be little doubt that if similar

(*e*) 3 B. & A. 611.

(*h*) See 5 B. & Ad. 933; 2 Cr. &

(*f*) 5 B. & C. 196, and 1 C. & P.

M. 623; 2 M. & W. 493.

369.

(*i*) *Ante*, p. 241, note (*c*).

(*g*) See, too, *Thomas v. Shillibeer*,
1 M. & W. 124.

cases were to arise again, and the jury found for the defendant, the verdict would not be disturbed.

This appears from *Thompson v. Percival* (*k*). In that case, the defendants, Charles Percival and James Percival, had as partners become indebted to the plaintiff. The partnership was dissolved, and it was agreed that the business should be carried on by James, and that he should receive and pay all debts, and assets sufficient to pay debts of the firm were left in his hands. The plaintiff, on applying to James for *payment, was told that he must look to him, James, alone, and the plaintiff accordingly drew a bill on James, and the bill was accepted by him. The bill being afterwards dishonoured, the plaintiff sued both James and Charles for the original debt, and obtained a verdict for the full amount; but the defendants had leave to move for a nonsuit if the Court should be of opinion that Charles had been discharged. The Court, without deciding that point, held that the question ought to have been left to the jury, and a new trial was therefore directed. The Court held that the facts proved raised a question for the jury, whether it was agreed between the plaintiff and James that the former should accept the latter as his sole debtor, and should take the bill of exchange accepted by him alone, by way of satisfaction for the debt due from both. If it was so agreed, the Court thought that the agreement and receipt of the bill would be a good answer on the part of Charles by way of accord and satisfaction (*l*).

Effect of these three cases.—It is not unusual to represent *Lodge v. Dicus* and *David v. Ellice*, as altogether overruled by *Thompson v. Percival*, and other cases. This, however, is not quite correct. The three cases together establish (1.) that a creditor who treats the continuing partners as his debtors, does not necessarily abandon his right to resort to a retired partner for payment; (2.) that whether he does or does not is a mixed question of law and fact which ought to be submitted to a jury; and (3.) that their verdict will not be disturbed by the Court upon the grounds acted on in *Lodge v. Dicus* and *Davis v. Ellice*.

(*k*) 5 B. & Ad. 925.

(*l*) In *Evans v. Drummond*, 4 Esp. 89, and *Reed v. White*, 5 ib. 122, a

retiring partner was held discharged on the ground here referred to. See *post*, p. 247.

Treating continuing partners as debtors.—That a creditor who treats the continuing partners as his debtors, does not without more discharge a retired partner, is shown by other cases, and especially by those in which the continuing partners have paid interest on the old debt at a rate, or in a manner, differently from that previously adopted.

An old case on this head, and one often referred to, is *Heath v. Percival (m)*, in which two partners indebted to the plaintiff on a bond dissolved partnership. One of them continued to *carry on the business, and took [*244] upon himself the partnership debts, and public notice was given that the creditors of the firm were either to come in and be paid their debts, or to look for payment to the continuing partner only. The plaintiff came in, but instead of being paid off, he kept the bond, receiving interest at 6*l.* instead of 5*l.* per cent. It was held that he did not thereby discharge the retired partner from his liability to pay the bond with interest at 5*l.* per cent.

Taking a new security from them.—Moreover, if the continuing partners give a new security for the old debt, this will not operate to discharge the retired partner, unless the creditor intended that such should be the case, or unless the new security is of such a nature as to merge the original debt. In *Bedford v. Deakin (n)*, three partners were indebted to the plaintiff on bills of exchange. They dissolved partnership, and arranged between themselves that one of them should pay the plaintiff. The plaintiff was informed of this arrangement, and took from one of the partners his separate promissory note, indorsed by a third party, for the amount of the debt, but expressly reserved his right to look to all three partners for payment, and the plaintiff retained the bills already in his possession. The notes when due were taken up by other bills, and they in their turn were several times renewed. Ultimately the plaintiff sued all the three partners on the original bills, and he was held entitled so to do, never having discharged any of them, either intentionally or otherwise.

(*m*) 1 P. Wms. 682, and 1 Str. 403.

(*n*) 2 B. & A. 210. See, too, *Swire v. Redman*, 1 Q. B. D. 536, where the plaintiff had not expressly reserved his rights against the retired

partner. See, also, *Featherstone v. Hunt*, 1 B. & C. 113; *Spenceley v. Greenwood*, 1 Fos. & Fin. 297. Compare *Evans v. Drummond*, 4 Esp. 89, noticed *infra*, p. 247.

Liability same in equity as at law. — Nor was there any difference in such cases as these between the liability of a retired partner at law and in equity. In *Oakford v. European and American Steam Ship Company (o)*, a partner retired, and the continuing partners indemnified him against all claims that might be made against him as a member of the firm. Disputes afterwards arose between the continuing partners and a company respecting a contract entered into before the retirement. These disputes were [*245] *partly adjusted. Those unadjusted were referred to arbitration pursuant to a clause in the contract. The reference was afterwards revoked; and an action upon the contract was then brought against the continuing partners and the retired partner. The retired partner sought to have this action restrained by injunction, upon the ground that his retirement and indemnity had placed him in the position of a surety only for the due performance of the contract; and that what had taken place since the retirement which was known to the company had discharged him. But it was held that his liability continued, and his bill was dismissed with costs.

Position of dormant partners. — The principle of the above cases applies to *dormant* partners even more strongly than to others; for a creditor who has a security of which he is unaware, cannot intentionally give up that security. Therefore, if A. and B. are partners, and the two become indebted to a creditor who knows only of A., and then B., the dormant partner, retires, no dealings between the creditor and A. will discharge B. from his liability to be sued when discovered, unless those dealings extinguish the original debt not only as against B. but also as against A. (*p*).

CLASS A *b*. — CASES IN WHICH A RETIRED PARTNER HAS NOT BEEN DISCHARGED, ALTHOUGH A NEW PARTNER HAS BEEN INTRODUCED INTO THE FIRM.

Effect of introduction of new partner on the liability of a retired partner. — The introduction of a new partner has no effect on the liability of a retired partner, unless the liability

(*o*) 1 Hem. & M. 182.

(*p*) *Robinson v. Wilkinson*, 3 Price, 538.

of the former is substituted by the creditor for that of the latter, which cannot be the case unless the creditor can, as of right, hold the new partner liable for the old debt. This, moreover, he cannot do by virtue of any agreement between the partners themselves; and even if the new firm adopts the old debt and pays interest on it, this is *primâ facie* only in pursuance of some agreement between the partners themselves; and a creditor who does no more than allow the partners to carry out that agreement, does not debar himself of his right to look for payment to those originally indebted to him.

* A leading case on this head is *Kirwan v. Kir-* [*246]
wan (*q*). There, three partners, C., M., and N., were indebted to the plaintiff. C. retired, and M. and N. continued in partnership together and agreed to discharge the debt of the old firm. M. afterwards retired, and N. took in a new partner. The plaintiff's account was transferred from the books of the old to the books of the new partnership, and interest was paid, and accounts were rendered to him as before. The plaintiff was informed of the dissolution, and had stated to one of the retired partners that he was aware he had no further claim upon him. But it was held, that the three original partners remained liable, as there was nothing to show that the security of the new firm had been substituted for that of the old, and the statement above referred to could not be regarded as an agreement to discharge the retired partner.

In *Gough v. Davies* (*r*), three persons were partners as bankers, and were indebted to the plaintiff. One of the partners retired; a new partnership was formed between the continuing partners and other persons; the plaintiff's debt was transferred to the books of the new firm, and he assented to such transfer. Moreover, the plaintiff continued to deposit money with the new firm, and was paid by it interest on the old debt and new deposits, as if they all formed one debt. But it was held, that there was nothing in all this to show any agreement by the plaintiff to discharge the retired partner, and he was consequently held liable for the old debt.

Blew v. Wyatt (*s*) is another case to the same effect. A clerk lent money to his employers, who were in partnership

(*q*) 2 Cr. & M. 617.

(*s*) 5 Car. & P. 397.

(*r*) 4 Price, 200.

as brewers, and took an acknowledgment for it. Several changes took place in the firm, one of the original partners retiring and other persons from time to time coming in and going out. The clerk remained in the employ of the firm notwithstanding these changes, and was aware of them, and was always paid interest by the firm for the time being. He was nevertheless held entitled to sue the two original partners for the money he had lent them.

Right to sue new firm not inconsistent with right to sue the old firm.—Whether in these cases of *Kirwan v. [*247] Kirwan, Gough v. * Davies, and Blew v. Wyatt*, the creditor could have sued the new firm, may perhaps be open to doubt (*t*). If he could not, it would be absurd to contend that the liability of the new firm was substituted for that of the old; whilst if he could, the evidence was not sufficient to show an intention on his part to deprive himself of the security afforded by the undoubted liability of the original firm before any change in it took place. It by no means follows that a creditor who assents to an arrangement by which a new person becomes liable to him, consents to abandon his hold on another person clearly liable to him already; and unless a substitution of liability can be established, the old liability remains (*u*).

CLASS B.—CASES IN WHICH A RETIRED PARTNER HAS BEEN DISCHARGED.

In all these cases it will be found that the Court or a jury has come to the conclusion that the creditor has in fact, either expressly or impliedly from his course of dealing with the continuing partners, adopted them as his sole debtors, and thereby in fact discharged the retired partner (*x*).

Retired partner may be discharged though no new partner comes in.—That a retired partner *may* be discharged by the creditor's adoption of the other partners as his sole debtors, although no new partner has been introduced into the firm,

(*t*) See *per Bolland, B.*, 2 Cr. & M. 628; *Daniel v. Cross*, 3 Ves. 277; *Fergusson v. Fyffe*, 8 Cl. & Fin. 121.

(*u*) See *Harris v. Farwell*, 15 Beav. 31.

(*x*) Mr. Pollock says truly, that

there is nothing to prevent a firm from stipulating with any creditor that he shall look only to the members of the firm for the time being. Dig. 30, ed. 3. See *Hort's case* and *Grain's case*, 1 Ch. D. 307.

is clear from the case of *Thompson v. Percival* (*y*) already noticed.¹

In *Evans v. Drummond* (*z*), a firm of two partners gave a partnership bill for goods supplied them. One of the partners retired, and the bill when due was not paid, but was renewed by another bill given by the partner who continued the business. The creditor took this bill knowing of the change in the firm. Lord Kenyon held, that by so doing the creditor had relied on the sole security of the continuing partner, and had *discharged the other. *Reed v. White* (*a*) [*248] is a similar case and to the same effect.

Effect of introduction of new partner.—The inference that a retired partner has been discharged is greatly facilitated by the circumstance that a new partner has joined the firm and become liable to the creditor in respect of the debt in question (*b*). But this is not necessarily conclusive; for there may be circumstances showing that such was not the intention of the parties (*c*). At the same time, in the absence of any such evidence, the acceptance by the creditor of the liability of a new partner will practically preclude him from afterwards having recourse to the retired partner (*d*).

In *Hart v. Alexander* (*e*), the plaintiff, an officer in the East India Company's service, had in 1813 opened an account with the house of Alexander and Co. of Calcutta, which failed in 1832. The defendant retired from the firm in 1822, when a new partner was introduced, and since that time other changes had taken place, some of the old partners retiring and new ones coming in. The defendant's retirement was advertised, and there was evidence to show that the plaintiff was aware of the fact. The new firms from time to time

(*y*) 5 B. & Ad. 925; *ante*, p. 242.

(*z*) 4 Esp. 89. Compare *Bedford v. Deakin*, 2 B. & A. 210, noticed *ante*, p. 244.

(*a*) 5 Esp. 122.

(*b*) See as to this, *ante*, pp. 205 *et seq.*

(*c*) See *infra*, p. 254, and *Keay v. Fenwick*, 1 C. P. D. 745.

(*d*) As to the effect of taking a new security when no new partner comes in, see *ante*, p. 244.

(*e*) 7 C. & P. 746, and 2 M. & W. 484. See, also, *Wilson v. Lloyd*, 16 Eq. 60; *Oakeley v. Pasheller*, 4 Cl. & Fin. 207, noticed *infra*, p. 251. Compare *Commercial Bank Corp. of India and the East*, 16 W. R. 958, and *Ex parte Gibson*, 4 Ch. 662.

¹ See *ante*, p. 222 and note. In *Penn National Bank v. Furness*, 114 U. S. 376, 29 L. ed. 178, a retiring partner was discharged from liability on notes given to pay to him the capital withdrawn on his retirement by the new firm.

accounted with the plaintiff and paid him interest, sometimes at one rate and sometimes at another. On the bankruptcy of the firm in 1832, the plaintiff proved the amount of his debt against its joint estate. The plaintiff afterwards sued the defendant; and the case was tried before Lord Abinger, who is reported to have said to the jury:—

“To ask you if there was an agreement by the plaintiff to discharge the defendant, is to put the case upon a false issue, the agreement, if any, being an agreement raised by construction of law: the true question being whether the plaintiff did not go on dealing with the new firm, and making up fresh accounts with them, so as to discharge the defendant. I take the law to be this: Where a debtor who is a partner in a firm, leaves that firm, and any person trading with the firm has notice of it, [*249] and he goes on dealing *with the firm and making fresh contracts, that discharges the retiring partner, though no new partner comes in. So it is if the creditor draws for part of his balance and sends in more goods; so, if the creditor strike a fresh balance with the new partners for a different rate of interest; so, if a new partner comes in and the creditor accept an account in which the new partner is made liable for the balance—that discharges the old firm, as both firms cannot be liable at once for the same debt. This is the law as laid down in several cases in which indeed there is some contradiction: however, I believe that what I have stated is the result of them” (f).

The jury found for the defendant. A new trial was moved for on the ground that there was no evidence to go to the jury to show that the plaintiff had agreed to discharge the defendant from his liability, but the Court (g) thought that there was abundant evidence to show that the plaintiff knew of the defendant's retirement, and a new trial was refused.

To this class of cases also belong those already noticed, in which the joint liability of old and new partners has been substituted for that of the old partners only (h).

Release by estoppel.—A creditor may so conduct himself as to be estopped from saying that a retired partner is still liable to him. But it is not often that this can be established. A settlement by partners of their accounts on the footing that one of them only is liable to a creditor, will not affect him unless he has been guilty of some fraud, or has done some act or made some statement in order to induce the

(f) The learned judge was scarcely warranted by those cases in going so far as he did.

(g) Bolland, B., *dissentiente*.

(h) *Ex parte* Whitmore, 3 Deac. 365; *Rolfe v. Flower*, L. R. 1 P. C. 27, noticed *ante*, pp. 208, 209.

partners, or one of them, to settle their accounts on the faith that one of them is no longer liable (*i*).

Discharge of estate of deceased partner.—Closely allied to the subject which has just been discussed, is that which relates to the discharge of the estate of a deceased partner from the liabilities to which he was subject as a partner at the time of his death. The position of the estate of a deceased partner, with reference to the question of discharge by reason of a creditor's dealings with the surviving *partners, is very similar to the position of a retired [*250] partner. The same principles are applicable to both, and the authorities which are in point as regards the one, are so also as regards the other. The parallel between the two would be complete, were it not that before the Judicature Acts the estate of a partner who died in the lifetime of his co-partners was liable for the joint debts of the firm in equity only (*k*); and there might have been circumstances to induce a Court of equity to hold that estate discharged, although the same circumstances would not, in the case of a retiring partner, have operated as a discharge at law (*l*), and *vice versa* (*m*).

It has been decided in equity that if a creditor of a firm knows of the death of one of the firm and continues to deal as before with the survivors, he does not lose the remedy which he had against the estate of the deceased partner, unless there is evidence showing an intention to abandon the right of having recourse thereto for payment (*n*); and an attempt by the creditor to obtain payment from the survivors is not sufficient evidence of such an intention. Thus, if he sues the survivors, and obtains judgment against them, this will not necessarily deprive him of his right to obtain payment out of the estate of the deceased (*o*). So, proving in

(*i*) See *Davison v. Donaldson*, 9 Q. B. D. 623; *Featherstone v. Hunt*, 1 B. & C. 113, a case of alleged fraud.

(*k*) As to the nature of this liability, see *ante*, p. 194.

(*l*) See *Ex parte Kendall*, 17 Ves. 522 and 525.

(*m*) *Jacomb v. Harwood*, 2 Ves. S. 265.

(*n*) *Winter v. Innes*, 4 M. & Cr. 101, and see *Devaynes v. Noble*, *Sleech's case*, 1 Mer. 539; *Clayton's case*, ib. 579; *Palmer's case*, ib. 623; *Braithwaite v. Britain*, 1 Keen, 206.

(*o*) *Jacomb v. Harwood*, 2 Ves. S. 265; and *ante*, p. 195, and *infra*, p. 257.

bankruptcy against the estate of the new firm, is not, *per se*, sufficient to preclude the creditor from afterwards having recourse to the assets of the dead partner (*p*). Still less will any dealing with the surviving partner if induced by his fraud (*q*).

Liability not discharged by dealing with new persons.— Even where a new partner has been introduced, a creditor of the old firm, who continues to deal with the new firm as he dealt with the old, and is paid interest by the [*251] new firm * as if the debt was its own, does not thereby deprive himself of his right to be paid out of the estate of a deceased member of the old firm (*r*). In *Harris v. Farwell* (*s*), a banking firm consisting of three partners became indebted to a customer on a deposit note; one of them died, and the survivors took his son into partnership with them. The new partnership paid interest on the note for some time, and then became bankrupt. The plaintiff proved against the new firm for the amount of his debt, and was paid a dividend out of its estate. It was held that he had done nothing which precluded him from having recourse to the estate of the deceased partner.

Effect of administering the estate.— On the other hand, if, after the death of a partner, a creditor of the old firm knows of the death, and does not take any steps to obtain payment from the estate of the deceased, if the creditor lies by and allows that estate to be administered as if he had no claim upon it, and if he continues to deal with the surviving partners as if they and they alone were his debtors, in that case the creditor will not be allowed to resort to the assets of the deceased. *Oakeley v. Pasheller* and *Brown v. Gordon* may be referred to as illustrating this doctrine.

In *Oakeley v. Pasheller* (*t*) two partners, A. and B., executed three joint and several bonds, to the plaintiff to secure

(*p*) *Sleech's case*, 1 Mer. 570; *Harris v. Farwell*, 15 Beav. 31. But compare *Brown v. Gordon*, 16 Beav. 302, and *Bilborough v. Holmes*, 5 Ch. D. 255, *infra*, note (*s*).

(*q*) As in *Plumer v. Gregory*, 18 Eq. 621.

(*r*) *Daniel v. Cross*, 3 Ves. 277.

(*s*) 15 Beav. 31. It does not appear from the report when the customer first knew of the change in

the firm. Compare *Bilborough v. Holmes*, 5 Ch. D. 255, a somewhat similar case, where the estate of the deceased partner was held to be discharged. The proof, however, there, was for money lent to the new firm.

(*t*) 10 Bl. N. S. 548, and 4 Cl. & Fin. 207. See on it, *Swire v. Redman*, 1 Q. B. D. 543. In *Wilson v. Lloyd*, 16 Eq. 60, this case was followed, though no new partner joined

repayment of money lent. A. died, and B. took in C. as a partner with him. An agreement was come to between A.'s executors and B. and C., that the latter should take the assets and liabilities of the old firm, and indemnify A.'s estate from those liabilities. Of this the plaintiff had notice (*u*). He was paid interest on his bond by the new firm, and received accounts from it in which the old debt and the debts contracted by the new firm were blended together. On two occasions the plaintiff * had agreed [*252] to give, and had given, the new firm considerable further time to pay the bonds, but A.'s executors had no notice of this. Ultimately the plaintiff took from B. and C. an assignment of some policies as a collateral security for payment of the bonds expressly reserving his rights against A.'s estate. It was, however, held that A.'s estate had been discharged from its liability from what had previously taken place. The Court thought that A.'s estate had become, as it were, surety only for payment of the debt, and that it had been discharged by the long indulgence granted by the plaintiff to the other debtors (*x*). The true *ratio decidendi*, however, was that the plaintiff had accepted B. and C. as his sole debtors.

In *Brown v. Gordon (y)*, the plaintiff deposited money with a banking firm consisting of three partners, A., B., and C.; D. afterwards became a partner. A. died, having made a will containing a trust for payment of his debts. After A.'s death his son, who was also his executor and residuary devisee and legatee, became a partner in the bank. Some time afterwards B. and C. died. The bank had been continued, first, by B., C., D., and A.'s son; then by D., C., and A.'s son, and lastly by D. and A.'s son; but it ultimately stopped payment, and the two surviving partners were adjudged bankrupts. Interest had been paid to the plaintiff by the successive firms, and the plaintiff's debt was proved in the Bankruptcy Court. On a

the firm, but *Wilson v. Lloyd* cannot be relied upon. See *Simpson v. Henning*, L. R. 10 Q. B. 406.

(*u*) See 4 Cl. & Fin. 212. The marginal note states that he had not.

(*x*) This quasi suretyship is surely a false analogy, unless the creditor has assented to such a change in his

debtor's position. See, on this point, *Oakford v. European, &c., Ship Co.*, 1 Hem. & M. 182, *ante*, p. 244; *Swire v. Redman*, 1 Q. B. D. 537. See, also, *Rodgers v. Maw*, 4 Dowl. & L. 66.

(*y*) 16 Beav. 302; *Bilborough v. Holmes*, 5 Ch. D. 255, a similar case, but not so strong. See *ante*, note (*s*).

bill filed for the purpose of obtaining payment out of A.'s estate, it was held that the plaintiff, by neglecting for sixteen years to make any claim against the assets of the deceased, and by treating the successive firms as his debtors, had discharged the estate of the deceased, and that he could not be considered as a creditor of the deceased, so as to avail himself of the trust in the will for payment of debts.

Cases of fraud.—In whatever way a creditor may [*253] have dealt with the surviving *partners, he cannot be held to have adopted them as his sole debtors in respect of a demand arising out of a fraudulent transaction, of which he has been constantly kept in ignorance (z).

Recapitulation.—Before leaving this subject, it may be useful shortly to review the effect of the numerous cases which have been noticed in the preceding pages. Those cases establish that:—

1. An express agreement by the creditor to discharge a retired partner, and to look only to a continuing partner, is not inoperative for want of consideration; for *Lodge v. Dicus* (a) has, as to this point, been overruled by *Thompson v. Percival* (b);

2. An adoption by the creditor of the new firm as his debtor does not by any means necessarily deprive him of his rights against the old firm either at law (c) or in equity (d);

3. And it will certainly not do so if, by expressly reserving his rights against the old firm, he shows that by adopting the new firm he did not intend to discharge the old firm (e);

4. And by adopting a new firm as his debtor, a creditor cannot be regarded as having intentionally discharged a person who was a member of the old firm, but was not known to the creditor so to be (f);

5. But the fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired

(z) See *Clayton's case*, 1 Mer. 579; *ante*, pp. 235, 236.

(a) 3 B. & A. 611.

(b) 5 B. & Ad. 925.

(c) *David v. Ellice*, 5 B. & C. 196; *Thompson v. Percival*, 5 B. & Ad. 925; *Heath v. Percival*, 1 P. W. 682, and 1 Str. 403; *Kirwan v. Kirwan*, 2 Cr. & M. 617; *Gough v. Davies*, 4 Price, 200; *Blew v. Wyatt*, 5 C. & P. 397.

(d) *Oakford v. European, &c., Ship Co.*, 1 Hem. & M. 182; *Sleech's case*, 1 Mer. 539; *Clayton's case*, *ib.* 579; *Palmer's case*, *ib.* 623; *Braitewaite v. Britain*, 1 Keen, 206; *Winter v. Innes*, 4 M. & Cr. 101.

(e) *Bedford v. Deakin*, 2 B. & A. 210; *Jacomb v. Harwood*, 2 Ves. S. 365.

(f) *Robinson v. Wilkinson*, 3 Price, 538.

partner jointly, is strong evidence of an intention to look only to the continuing partner for payment (*g*) ;

6. And a creditor who assents to a transfer of his debt from an old firm to a new firm, and goes on dealing with the latter for many years, making no demand for payment against the * old firm, may not unfairly be in- [*254]ferred to have discharged the old firm. If a jury finds that he has done so, the Court will not disturb the verdict (*h*) ; and if the question arises before a Judge, *e.g.*, in bankruptcy or in the administration of the estate of a deceased partner, the Court will consider all the circumstances of the case, and will infer a discharge if, upon the whole, justice to all parties so requires (*i*). But the small number of cases in which relief has been refused, compared with those in which it has been granted, shows that the leaning of the Court is strongly in favour of the creditor.

(*b.*) *Of the effect of merger and judgment recovered.*

Merger of one security in another.— Having now examined the mode in which a partner may be discharged from liability, by reason of a substitution of some other person in his place with the creditor's assent, it is necessary to advert to a doctrine by which a partner occasionally finds himself discharged, simply because his creditor has obtained a security of a higher nature than that which he previously possessed.¹

Bills, &c., create no merger.— If a person solely indebted enters into partnership with another, and the two give a joint note or bill for the debt of the first, and the note or bill is not paid, the creditor is not precluded from demanding

(*g*) *Evans v. Drummond*, 4 Esp. 89; *Reed v. White*, 5 ib. 122.

(*h*) *Hart v. Alexander* 2 M. & W. 484.

(*i*) *Ex parte Kendall*, 17 Ves. 522-5; *Oakeley v. Pasheller*, 4 Cl. & Fin. 207; *Wilson v. Lloyd*, 16 Eq. 60; *Brown v. Gordon*, 16 Beav. 302.

¹ A bond given by an agent of the owners of a ship who is himself a part-owner, for a debt due from the owners, merges their obligation. *Banorjee v. Hovey*, 5 Mass. 11. See also *Bond v. Aitken*, 6 W. & S. 165; *McNaughten v. Partridge*, 11 Ohio, 223.

And the acceptance of a higher security or obtaining a judgment on a claim, merges the debt in the specialty or judgment. *Smith v. Blush*, 9 Serg. & R. 142; *Mason v. Eldred*, 6 Wall. 231, 18 L. ed. 783; *Sessions v. Johnson*, 95 U. S. 347, 24 L. ed. 596; *United States v. Ames*, 99 U. S. 35, 25 L. ed. 295; *Cowley v. Patch*, 120 Mass. 137. But a judgment is not merged in a bond. *Bennett v. Caldwell*, 70 Penn. St. 253.

payment from his original debtor (*k*), unless it can be shown that the bill or note was taken in satisfaction of the original demand (*l*). So, if two partners are indebted on the partnership account, and one of them gives a bill or note for the debt, and that bill or note is dishonoured, the creditor who took it will not be precluded from having recourse to both partners for payment (*m*), unless it can be [*255] * shown that he intended to substitute the liability of the one for the joint liability of the two (*n*).

Securities of a higher nature do.— But when a creditor obtains from his debtor a security of a higher nature than he had before, and does not take care to accept it as a collateral security (*o*), the original debt is merged in the higher security, and can no longer be made the foundation of an action, or of proof in bankruptcy (*p*); and this doctrine is as much applicable to joint as to several obligations. And there is no mean authority for saying that if two parties are jointly indebted by simple contract, and one of them gives his bond for payment of the debt, the joint debt is at an end (*q*); but there are recent decisions to the contrary (*r*), and the question cannot be considered as yet settled.

Judgment recovered.— If a joint creditor obtains judgment against one of the partners only, he loses his remedy against the others even if not known to him (*s*). But this rule does not apply when the other partners are abroad, and cannot

(*k*) *Ex parte* Seddon, 2 Cox, 49; *Ex parte* Lobbs, 7 Ves. 592; *Ex parte* Meinertzhagen, 3 Deac. 101; *Ex parte* Hay, 15 Ves. 4; *Ex parte* Kedie, 2 D. & C. 321.

(*l*) As in *Ex parte* Whitmore, 3 Deac. 365; *Ex parte* Kirby, Buck, 511; *Ex parte* Jackson, 2 M. D. & D. 146.

(*m*) *Keay v. Fenwick*, 1 C. P. D. 745; *Bottomley v. Nuttall*, 5 C. B. N. S. 122; *Whitwell v. Perrin*, 4 C. B. N. S. 412; *Ex parte* Hodgkinson, 19 Ves. 291. See, too, *Ex parte* Raleigh, 3 M. & A. 670; *Bedford v. Deakin*, 2 B. & A. 210, noticed *ante*, p. 244.

(*n*) As the jury found was the case in *Evans v. Drummond*, 4 Esp. 89, and *Reed v. White*, 5 ib. 122. Compare the cases in the last note.

(*o*) As in *Ex parte* Hughes, 4 Ch. D. 34, note.

(*p*) *Ex parte* Oriental Financial Corporation, 4 Ch. D. 33; *Higgen's* case, 6 Co. 44 *b*; *Owen v. Homan*, 3 Me. & G. 378; *Price v. Moulton*, 10 C. B. 561; *Shack v. Anthony*, 1 M. & S. 573. A judgment on a covenant in a mortgage does not affect the right of the mortgagee to foreclose; *Popple v. Sylvester*, 22 Ch. D. 98; *Ex parte* Fewings, 25 Ch. D. 338.

(*q*) *Bassett v. Wood*, 11 Vin. Ab. Exting. B. 8; and see *Owen v. Homan*, 3 Me. & G. 407; *Ex parte* Hernaman, 12 Jur. 642, and 17 L. J. Bk. 17.

(*r*) *Sharpe v. Gibbs*, 16 C. B. N. S. 527; *Ansell v. Baker*, 15 Q. B. 20; and *infra*, note (*v*).

(*s*) *Kendall v. Hamilton*, 4 App. Ca. 504, *ante*, pp. 193 *et seq.*; *King v.*

therefore be sued here with effect (*t*). If one partner only is sued, and judgment is given for him, the creditor is not precluded from afterwards suing the others, unless the first action failed for a reason which applies equally to the second (*u*).

It has been already seen that a judgment recovered against continuing partners and an incoming partner is a defence to an *action against a retired partner who [*256] might have been sued with the continuing partners in the first instance (*x*).

Merger of joint and several obligations.—With respect to obligations which are joint as well as several, there is more difficulty. A joint and several obligation, arising *ex delicto*, is extinguished by a judgment recovered against any one of the persons obliged (*y*); but, as regards joint and several obligations arising *ex contractu*, although a joint judgment against all the persons obliged extinguishes the separate liability of each, for *nemo debet bis vexari pro eâdem causâ*, yet a judgment obtained against one of them only does not extinguish the separate liability of the others (*z*). In order that this effect may be produced the judgment must be satisfied (*a*). As regards joint and several liabilities arising from breaches of trust, a joint judgment does not preclude proof in bankruptcy against the separate estates of the judgment debtors (*b*).

Further, if several persons are jointly liable, and one of them afterwards gives a separate collateral security on which judgment is recovered against him, this will not merge the prior joint liability (*c*).

Hoare, 13 M. & W. 494; *Ex parte Higgins*, 3 De G. & J. 33. See as to dormant partners, *Cambefort v. Chapman*, 19 Q. B. D. 229, noticed *ante*, p. 193, note (*k*). In *Baddeley v. Consolidated Bank*, 34 Ch. D. 536, the surety had not recovered judgment, and this rule did not apply. A colonial judgment creates no merger, *Bank of Australasia v. Nias*, 16 Q. B. 717.

(*t*) See 19 & 20 Vict. c. 97, § 11; *Ex parte Waterfall*, 4 De G. & S. 199.

(*u*) *Phillips v. Ward*, 2 Hurlst. & C. 717.

(*x*) *Scarfe v. Jardine*, 7 App. Ca. 345, *ante*, pp. 46 and 197. See, also,

Cambefort v. Chapman, 19 Q. B. D. 229, *ante*, p. 193, note (*k*).

(*y*) *Brinsmead v. Harrison*, L. R. 6 C. P. 584, aff. 7 ib. 547; *Brown v. Wootton*, Cro. Jac. 73; *Buckland v. Johnson*, 15 C. B. 145; and see, as to the plea of another suit depending, *Boyce v. Douglas*, 1 Camp. 61.

(*z*) *Ex parte Christie*, Mon. & Bl. 352. See, also, *Ansell v. Baker*, 15 Q. B. 20.

(*a*) *Higgen's case*, 6 Co. 46 a; *King v. Hoare*, 13 M. & W. 494; and see *Drake v. Mitchell*, 3 East, 251.

(*b*) *Re Davison*, 13 Q. B. D. 50.

(*c*) *Drake v. Mitchell*, 3 East, 251.

Effect of doctrines of merger on securities for future advances.

—The rule that a bond or judgment merges any simple contract debt in respect of which it may have been given or obtained, only applies if the simple contract debt existed first in order of time, and if the specialty creditor is the same as the simple contract creditor. So that if a bond is given or a judgment is obtained (under a warrant of attorney) as a security for *future* advances (*d*): or if a simple contract debtor gives a bond or *confesses a judgment to a trustee for his creditor (*e*), in neither of these cases will there be any merger.

Estates of deceased partners.—It must also be borne in mind that as regards the liability of the estate of the deceased partner, at law when a partner died his liability on contracts survived to his co-partner, who alone could be sued in respect of them. Hence a judgment recovered against the surviving members of a firm does not preclude the judgment creditor from obtaining payment of his original debt from the estate of the deceased partner in equity (*f*); nor does proof against his estate afford a defence to an action against the surviving partners (*g*).

Merger not an extinction of the debt.—Further, it is to be observed that merger does not, properly speaking, extinguish a debt; for, notwithstanding the fact that a debt is merged in a higher security, the merged debt is sufficient to support an adjudication of bankruptcy against the debtor (*h*).

Proof in bankruptcy.—Again, proof in bankruptcy against the estate of one partner in respect of a partnership debt does not preclude the proving creditor from afterwards suing the solvent partners, and recovering from them what he may have failed to obtain in the bankruptcy (*i*).

See, too, *Re Clarkes*, 2 Jo. & Lat. 212; *Ex parte Bate*, 3 Deac. 358. Compare *Cambefort v. Chapman*, 19 Q. B. D. 229, noticed *ante*, p. 193, note (*k*).

(*d*) *Holmes v. Bell*, 3 Man. & Gr. 213, and the note there.

(*e*) *Bell v. Banks*, 3 Man. & Gr. 258. In such a case equity would probably follow the law, *ut res magis valeat quam pereat*.

(*f*) *Jacomb v. Harwood*, 2 Ves. S.

265; *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24. See, also, *Rawlins v. Wickham*, 3 De G. & J. 304, *ante*, pp. 195, 250.

(*g*) *Re Hodgson*, 31 Ch. D. 177.

(*h*) *Re Davison*, 13 Q. B. D. 50; *Re Griffiths*, 3 De G. M. & G. 174, and the cases there cited.

(*i*) *Keay v. Fenwick*, 1 C. P. D. 745; *Whitwell v. Perrin*, 4 C. B. N. S. 412; *Bottomley v. Nuttall*, 5 C. B. N. S. 122.

4. *Lapse of Time.*

Statutes of limitation. — By a number of well-known enactments, usually referred to as the Statutes of Limitation, a certain definite time has been prescribed, within which, if at all, a person having a demand against another must enforce it. These estates apply as well to partners as to other persons, and it becomes, therefore, necessary to advert to them in the present work.

The principal statutes are the following (*k*): — 21

Jac. 1, * c. 16; 4 & 5 Anne, c. 16; 3 & 4 Wm. 4, c. [*258] 27; 3 & 4 Wm. 4, c. 42; 19 & 20 Vict. c. 97; 37 & 38 Vict. c. 57.

Times limited for bringing actions. — Neglecting those provisions of the Statutes of Limitation, which are of little importance to partners, the times prescribed for the prosecution of actions are as follows: —

Twelve years. — *Twelve years* for the recovery of legacies, of rent, of money charged on lands, of money due on judgments, bonds, and mortgages, and for the redemption of mortgages (3 & 4 Wm. 4, c. 27, §§ 28 and 40; 3 & 4 Wm. 4, c. 42; 37 & 38 Vict. c. 57).

Six years. — *Six years* for the recovery of arrears of rent, and of interest on money charged on land (3 & 4 Wm. 4, c. 27, §§ 41, 42), and for the recovery of seamen's wages (4 & 5 Anne, c. 16, § 17); and of money due on bills of exchange, promissory notes, or in respect of any other contract which is not under seal (21 Jac. 1, c. 16, § 3); and of money due on awards where the submission is not under seal (3 & 4 Wm. 4, c. 42, § 3); and for the institution of actions or suits for an account (21 Jac. 1, c. 16, § 3, and 19 & 20 Vict. c. 97, § 9).

Four years. — *Four years* for the recovery of damages in respect of an assault, battery, or false imprisonment (21 Jac. 1, c. 16, § 3).

Two years. — *Two years* for the recovery of damages for words of themselves defamatory (21 Jac. 1, c. 16, § 3); and for the recovery of penalties, damages, or sums given by statute to the party grieved (3 & 4 Wm. 4, c. 42).

Further time. — There are provisions extending these periods

(*k*) The principal act relating to Ireland is 16 & 17 Vict. c. 113. See § 20.

in favour of persons who, when their right to sue accrues, are within the age of twenty-one, under the disability of coverture, or of unsound mind (*l*); and also in favour of those whose demands are against persons beyond the seas (*m*). But the absence beyond the seas of one of several joint debtors does not now, as it did formerly, enlarge the time for suing the others (*n*).

[*259] * **Account between merchants.**—By the statute of James, actions “for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants,” were excepted from limitation, but this exception no longer exists (*o*); and actions for an account, or for not accounting, must be brought within six years (*p*).

General rules applicable to the Statutes of Limitation.—In applying the Statutes of Limitation to any particular case, it is important to bear in mind one or two principles applicable to them all.

1. **Foreign debts.**—Although a debt may have been contracted abroad, any person who attempts to enforce it in this country must do so within the time limited by the English statutes; for it is by them, and not by the law of the place where the debt was contracted, that English courts are governed in a matter of this description (*q*).

2. **Continuous running of time.**—When once time has begun to run, no subsequent disability or inability to sue stops it (*r*):

(*l*) 21 Jac. 1, c. 16, § 7; 3 & 4 Wm. 4, c. 42, § 4; 3 & 4 Wm. 4, c. 27, § 16, &c.; 37 & 38 Vict. c. 57, § 3. The imprisonment or absence beyond the seas of a creditor does not now enlarge his time for suing, 19 & 20 Vict. c. 97, § 10, *Cornill v. Hudson*, 8 E. & B. 429; *Pardo v. Bingham*, 4 Ch. 735. The absence beyond the seas of one of several joint creditors did not enlarge their time for suing under the old law. *Perry v. Jackson*, 4 T. R. 516.

(*m*) 4 & 5 Anne, c. 16, § 19, and 3 & 4 Wm. 4, c. 42, § 4.

(*n*) 19 & 20 Vict. c. 97, § 11. See, as to what is beyond the seas, § 12, and as to the old law, *Fannin v. Anderson*, 7 Q. B. 811; *Towns v. Mead*, 16 C. B. 123.

(*o*) 19 & 20 Vict. c. 97, § 9.

(*p*) See 19 & 20 Vict. c. 97, § 9,

and 21 Jac. 1, c. 16, s. 3. This branch of the subject will be examined more at length in that part of the work which treats of accounts between partners. The principal cases on the exception relating to merchants' accounts are, *Inglis v. Haigh*, 8 M. & W. 769; *Cottam v. Partridge*, 4 Man. & Gr. 271; *Robinson v. Alexander*, 8 Bli. N. S. 352; *Forbes v. Skelton*, 8 Sim. 335. See *Webber v. Tyvill*, 2 Wms. Saund. 124, and the note there.

(*q*) See *The British Linen Co. v. Drummond*, 10 B. & C. 903; *Huber v. Steiner*, 2 Bing. N. C. 202.

(*r*) See *Rhodes v. Smethurst*, 4 M. & W. 42, and 6 ib. 351; *Goodall v. Skerratt*, 3 Drew. 216; *Wych v. East India Co.*, 3 P. W. 309. There is, however, an exception to this rule, where an action brought in time becomes abated, and another is after-

except where a defendant dies and there is no representative to sue (*s*).

3. **When time begins to run.**—Time begins to run from the moment the right to sue arises (*t*); but in a case of concealed fraud, from the moment *when the [*260] person acquiring the right first becomes aware of it (*u*).

4. **Cases of trust.**—The claim of a *cestui que trust* against his trustee in respect of a breach of an express trust is not barred by mere lapse of time (*x*); although it is otherwise if the trust is only constructive (*y*). In consequence of the first branch of this rule, if a partner dies, having made a will containing a trust for payment of his debts, his estate will be liable to the demands of creditors of the firm much longer than if there were no such trust in the will (*z*).

5. **Revival of debts.**—After time has begun to run, and even after it has run, a debt may be revived by a written promise to pay it; or by an acknowledgment in writing, from which a promise to pay it may be inferred (*a*); or by a payment on account of the principal or interest due (*b*), from which a similar promise may be implied (*c*).

wards commenced. See *Sturgis v. Darrell*, 4 H. & N. 622, and 6 ib. 120. See, as to how far merely landing at an English port is a return, so as to make time begin to run, *Gregory v. Hurrill*, 5 B. & C. 341, and 1 Bing. 324.

(*s*) *Swindell v. Bulkeley*, 18 Q. B. D. 250.

(*t*) This was so at law, even in cases of concealed fraud; *The Imperial Gas Co. v. The London Gas Co.*, 10 Ex. 39; *Hunter v. Gibbons*, 1 H. & N. 459. See *Bree v. Holbech*, Dougl. 655. But see now, *Jud. Act*, 1873, § 24; *Jud. Act*, 1875, § 10, cl. 11, and the cases in the next note.

(*u*) *Gibbs v. Guild*, 9 Q. B. D. 59; *South Sea Co. v. Wymondsell*, 3 P. W. 143; *Blair v. Bromley*, 2 Ph. 354, and 5 Ha. 542; *Petre v. Petre*, 1 Drew. 397. The fraud in *Urquhart v. Macpherson*, 3 App. Ca. 838, was not alleged to have been concealed.

(*x*) See *Jud. Act*, 1875, § 10, cl. 2.

(*y*) *Banner v. Berridge*, 18 Ch. D. 254; *Beekford v. Wade*, 17 Ves. 87.

(*z*) See *Ault v. Goodrich*, 4 Russ. 430; *Braithwaite v. Britain*, 1 Keen,

266; *Brown v. Gordon*, 16 Beav. 302. See, also, *Pare v. Clegg*, 29 Beav. 589, where a society's property was on its dissolution subjected to a trust for the payment of its creditors.

(*a*) See *Tanner v. Smart*, 6 B. & C. 603. The cases upon the question, what is a sufficient acknowledgment? are innumerable. The following are selected for reference:—*Green v. Humphreys*, 26 Ch. D. 474; *Mitchell's claim*, 6 Ch. 822, a letter without prejudice; *Bourdin v. Greenwood*, 13 Eq. 281, a mem. on prom. note; *Bush v. Martin*, 2 H. & C. 311, entry by a committee in their minutes; letter asking for an account, or admitting a liability to account; *Banner v. Berridge*, 18 Ch. D. 254; *Quincey v. Sharpe*, 1 Ex. D. 72; *Prance v. Sympton, Kay*, 678. A letter from one partner to another will not avail a creditor whose debt is mentioned and recognised in it, *Re Hindmarsh*, 1 Dr. & Sm. 129.

(*b*) See *Whitecomb v. Whiting*, 1 Smith, L. C., and the note there.

(*c*) See *Morgan v. Rowlands*, L. R. 7 Q. B. 493.

Application of these rules to partners.—In order that the application of these general rules to partners may be fully understood, it becomes necessary to consider the extent to which one partner can affect the other by acknowledging and promising to pay, or by making payments on account of a partnership debt.

Old Law.—The old law upon this subject was materially altered by the Mercantile Law Amendment Act, [*261] *but in order to understand its provisions a short allusion to the law as it previously stood is necessary. Prior to the act in question, it was held that:—

1. **Admissions by one partner.**—An admission by one of several joint debtors that their debt was still due, was not sufficient to take the case out of the statutes as against the others; nor even as against the person making the admission, unless it were in writing signed by him (*d*).

2. **Promise by one partner.**—An actual promise by one of several joint debtors that the debt should be paid, was of no validity against any person except him who made it, and not even against him unless it were in writing and signed by him (*e*).

3. **Payment by one partner.**—But as regards payment (*f*), it was held that if one of several joint debtors paid any money on account of the principal or interest due from them all, such payment was sufficient to take the debt out of the statute, not only as against the person making the payment, but as against all the others jointly liable [*262] with him (*g*). But even before the Mercantile * Law Amendment Act payment by a surviving partner did

(*d*) 9 Geo. 4, c. 14, § 1; *Hyde v. Johnson*, 2 Bing. N. C. 777; *Bristow v. Maxwell*, 11 Ir. Law Rep. 461. It was otherwise before 9 Geo. 4, c. 14. See *Manderston v. Robertson*, 4 Man. & Ry. 440. As to admissions by one partner, see *ante*, p. 128.

(*e*) See the last note.

(*f*) As to payment by bills, see *Gowan v. Forster*, 3 B. & Ad. 507; *Irving v. Veitch*, 3 M. & W. 90; *Turney v. Dodwell*, 3 E. & B. 136.

(*g*) See *Whitcomb v. Whiting*, 2 Dougl. 652, and 1 Sm. L. C.; 9 Geo. 4, c. 14, § 1. The doctrine that payment by one partner took a debt out

of the statute as against all, was generally rested on the ground that the partner making the payment acted virtually as the agent for the rest. But the right of one of several co-debtors (whether they are partners or not) to make a payment on account of the joint debt, is not derived from any authority conferred by the other debtors, for they have no right to prevent their co-debtor from relieving himself from a liability to which he is subject as much as they. Moreover, admitting that the doctrines of agency are applicable to payments made by one of several co-debtors, it is

not prejudice the estate of a deceased partner (*h*) any more than a payment by the executors of the deceased prejudiced the partners who survived (*i*); for the executors of a deceased partner are not liable jointly with the surviving partners. But if one of the surviving partners was an executor of the deceased, then a question of a different nature arose, turning not only on the effect of the payment as such, but on whether it was made by the survivors as surviving partners only, or as to one of them in his character of executor also (*k*).

Liability in equity of estate of deceased partner.—The effect of the Statutes of Limitation upon suits in equity against the executors of a deceased partner was not well settled. In *Winter v. Innes* (*l*) Lord Cottenham expressed a doubt whether the executors could set up the statute where the surviving partner continued liable and had a right of contribution against them: but in *Way v. Bassett* (*m*) the statute was successfully relied upon as a defence by the executors of a deceased partner, although the surviving partners had by various payments kept the debt alive as against themselves. The law now is in accordance with the latter decision (*n*).

Alterations introduced by 19 & 20 Vict. c. 97.—By the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, it is enacted as follows:—

§ 13. In reference to the provisions of the acts of 9 Geo. 4, c. 14, §§ 1 and 8, and 16 & 17 Vict. c. 113, §§ 24 and 27 (Irish), an acknowledgment or promise made or contained by or in a writing signed by an agent of

impossible to justify, on that ground, the decisions which have just been noticed. They were all, it is said, based upon this, that a part payment is evidence of a *new* promise to pay more (*Bateman v. Pinder*, 3 Q. B. 574). But upon what principle can it be held, that after a partnership is dissolved, one partner has any implied authority from his late partners, to bind them by a fresh promise to pay an old debt? Assuming the debt to be already barred, the question can admit of no satisfactory answer, and yet the decisions went the length of binding the firm even in this extreme case. See the excellent judgment in

Bell v. Morrison, 1 Peters, 351, set out in Story on Part. § 324, note.

(*h*) *Atkins v. Tredgold*, 2 B. & C. 23.

(*i*) *Slater v. Lawson*, 1 B. & Ad. 396.

(*k*) See *Braithwaite v. Britain*, 1 Keen, 206, where the payment prevailed; *Way v. Bassett*, 5 Ha. 55; *Brown v. Gordon*, 16 Beav. 302, where it did not. See, further, *Griffin v. Ashby*, 2 Car. & Kir. 139; *Atkins v. Tredgold*, 2 B. & C. 23.

(*l*) 4 M. & Cr. 101.

(*m*) 5 Ha. 55.

(*n*) 19 & 20 Vict. c. 97, § 14, *infra*.

the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

Payments by one of several co-debtors.—§ 14. In reference to the provisions of the acts 21 Jac. 1, c. 16, § 3; 3 & 4 Wm. 4, c. 42, § 3, and 16 and 17 Vict. c. 113, § 20 (Irish), when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any co-contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be [*263] *chargeable in respect or by reason only (*o*) of payment of any principal, interest or other money, by any other or others of such co-contractors, or co-debtors, executors or administrators.

Effect of above statute on partners.—The above statute, it will be observed, has materially altered the law as regards the effect of acknowledgments and part-payments. An acknowledgment by an agent being now sufficient to affect his principal, acknowledgment by one partner will, it is apprehended, be regarded as an acknowledgment by the firm: and notwithstanding § 14, a part-payment by a partner will probably be regarded as a part-payment by the firm (*p*).

But after a dissolution a part-payment by a continuing or a surviving partner will not prevent a retired partner (*q*), or the executors of a deceased partner (*r*), from availing themselves of the statute; and the same is true of an acknowledgment (*s*).

(*o*) See, as to this word, *Cockrill v. Sparkes*, 1 H. & C. 699.

(*p*) See *Goodwin v. Parton*, 42 L. T. 568; *Watson v. Woodman*, 20 Eq. p. 730.

(*q*) *Ibid.* 721.

(*r*) *Thompson v. Waithman*, 3 Drew. 628, in which the surviving partner was the sole executor of the deceased. In this case, § 14 of the act in question was treated as having a retrospective operation, and as destroying the effect of a payment made before the act passed. This,

however, was a mistake. In every other respect the case is good law. As to the non-retrospective operation of § 14 of the statute, see *Jackson v. Wooley*, 8 E. & B. 778; *Flood v. Patterson*, 29 Beav. 295.

(*s*) If in any case it could be shown that a continuing or surviving partner was in point of fact authorised to act for the late partner or his executors in making acknowledgments or payments, the case would be different.

* CHAPTER III.

[*264]

OF ACTIONS BETWEEN PARTNERS AND NON-PARTNERS.

General observations.—In order to complete the subjects discussed in the preceding chapters it is necessary to examine the remedies by which rights and obligations between partners and non-partners can be enforced.

It is unnecessary to dwell upon criminal prosecutions, for although partners may be prosecutors or prosecuted in respect of criminal offences, the fact that they are partners has little, if any, effect on their position in a criminal point of view.

The remedies which alone are of sufficient importance to require consideration in a treatise like the present are actions, defences by way of set-off, proceedings to enforce judgments, and proceedings in bankruptcy. The subject of bankruptcy will be discussed hereafter, and the present chapter will therefore be confined to actions, set-off, and execution.

SECTION I.—ACTIONS BY AND AGAINST PARTNERS.*General observations.*

The Judicature Acts, 1873 and 1875, and the rules of the Supreme Court, 1883, have materially altered and improved legal proceedings by and against partnerships and unincorporated companies.¹

¹ In *Massachusetts* (Pub. Stat. chap. 183, sec. 7), when partners are summoned as trustees (garnishee process), in a writ from the inferior courts, service of the writ on one of the partners is sufficient, if the partnership is properly described in the writ.

And in *Iowa* (Code, sec. 2553), *Gregory v. Harmon*, 10 Iowa, 444; *Markham v. Buckingham*, 21 Iowa, 494, and *New Mexico* (Code, sec. 1886), actions may be brought against a partnership as such, or against all the individual members of it. And a new action may be brought upon this same cause against the partners not sued.

Nebraska (Code, sec. 24): *Burlington & Missouri River R. R. v. Dick*, 7 Neb. 242. Statutes held not alternative.

1. There is now no distinction between legal and equitable rules as regards parties to sue and be sued (*a*).

2. No action can be defeated by reason of the misjoinder or non-joinder of parties (*b*); and pleas in abatement are abolished (*c*). If too many or too few persons join [*265] as *plaintiffs, and the defendant can show that he is thereby prejudiced, he can apply to have the improper plaintiffs struck out, or the proper plaintiffs joined, as the case may be (*d*).

3. All persons may be joined as plaintiffs, or as defendants, in or against whom the right to any relief claimed is alleged to exist, whether jointly or severally, or in the alternative (*e*).

4. A plaintiff may at his option join, as parties to the same action, all or any of the persons severally, or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes (*f*).

5. Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant (*g*), provided no inconvenience is thereby occasioned (*h*).

6. Parties required by a defendant to be joined for his indemnity or relief by way of contribution may be brought before the Court (*i*).

7. Where there are numerous parties having the same interest in one action, one or more of them may sue or be sued on behalf of all (*k*).

(*a*) See Supreme Court Rules, 1883, Order xvi.

(*b*) Ord. xvi. r. 11; *Pilley v. Robinson*, 20 Q. B. D. 155; and see *Kendall v. Hamilton*, *ante*, p. 193, note (*k*).

(*c*) Ord. xxi. r. 20; *Pilley v. Robinson*, *supra*.

(*d*) Ord. xvi. r. 11.

(*e*) Ord. xvi. rr. 1 and 4.

(*f*) Ord. xvi. r. 6.

(*g*) Ord. xviii. r. 6.

(*h*) *Ib.* r. 7.

(*i*) Ord. xvi. r. 48 *et seq.* See *Birmingham Land Co. v. L. & N. W. Rail. Co.*, 34 Ch. D. 261.

(*k*) Ord. xvi. r. 9.

In other states modifications are liberally construed: as, —

Ohio: *Haskins v. Alcott*, 13 Ohio St. 210; *Whitman v. Keith*, 18 Ohio St. 134.
Alabama: *Sims v. Jacobson*, 51 Ala. 186.

Michigan: *Mason v. Eldred*, 6 Wall. 231, 18 L. ed. 783.

Illinois: *United States Exp. Co. v. Bedbury*, 34 Ill. 459.

Mississippi: *Morris v. Hilery*, 8 Miss. 61; *Amis v. Smith*, 16 Pet. 303, 10 L. ed. 973.

Pennsylvania: *McFadden v. Hunt*, 5 W. & S. 468; *McConkey v. Rogers*, *Brightley*, N. P. 450.

New York: *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648.

But a judgment against an absent partner, where the *lex loci* allows service on one partner to bind the firm, cannot be enforced against him out of the local jurisdiction. *Phelps v. Brewer*, 9 Cush. 390.

8. Any two or more persons claiming or being liable as co-partners may sue or be sued in the names of the firms of which they were members when the cause of action accrued (*l*); and provision is made for the discovery of the individuals so suing or being sued (*m*).

Actions in the mercantile name.—With reference to this last rule, it is to be observed that the firm's name, when used in any action, is merely a convenient method of expressing the names of those who constituted the firm when the cause of action accrued. The rule does not incorporate the firm (*n*); so that if A. is a creditor of a firm, B., C. and D., and D. retires and E. takes his place and the name of the firm continues unchanged, A. cannot maintain an *action [*266] against B., C. and E. in the name of the firm, unless B., C. and E. have become or are content to be treated as his debtors. In the case supposed, an action against the firm would mean an action against B., C. and D., *i.e.*, A.'s real debtors.

Where there have been no changes in the firm.—Where there have been no changes amongst the members of a firm since the cause of action accrued, there is no difficulty in following the rules. The writ may be served either upon any one or more of the partners, or at the principal place of business of the firm, upon any person having the control or management of the partnership business there (*o*). Appearances are entered by the partners in their own names, but subsequent proceedings continue in the name of the firm (*p*). If all the members of the firm have properly appeared, judgment may be entered up against the firm (*q*), but not otherwise (*r*).

Where there have been changes.—Where changes have oc-

(*l*) Ib. rr. 14 and 15.

(*m*) Ord. xvi. rr. 14 and 15, and Ord. vii. r. 2. See, as to the old law, *Woollf v. City Steam Boat Co.*, 7 C. B. 103.

(*n*) See *per* James, L. J., in *Ex parte Blain*, 12 Ch. D. 533. As to the Scotch law from which the rule was taken, see *Bullock v. Caird*, L. R. 10 Q. B. 276.

(*o*) Ord. ix. r. 6. See, as to foreign firms, *Pollexfen v. Sibson*, 16 Q. B. D. 792; *Baillie v. Goodwin*, 33 Ch. D.

604; and as to lunatics, *Fore Street Warehouse Co. v. Durrant & Co.*, 10 Q. B. D. 471.

(*p*) Ord. xii. r. 15.

(*q*) *Ib.* *Jackson v. Litchfield*, 8 Q. B. D. 474.

(*r*) *Adam v. Townend*, 14 Q. B. D. 103; *Jackson v. Litchfield*, 8 Q. B. D. 474; *Munster v. Cox*, 10 App. Ca. 680, affirming *Munster v. Railton*, 11 Q. B. D. 435. As to execution, see *infra*, § 3.

curred amongst the members of the firm since the cause of action accrued little, if any, advantage is derived from using the name of the firm. If an action is brought against a firm which the plaintiff knows has been dissolved before the commencement of the action, the writ must be served upon all the persons sought to be made liable (*s*). If, as sometimes happens, the plaintiff sues a firm and obtains judgment against it, without having discovered that any changes have occurred in it since the cause of action accrued, he may find himself in a difficulty when he seeks to enforce his judgment. In such a case it may well happen that the person against whom he seeks to enforce it is not one of those mentioned in Ord. XLII., r. 10, and is, in fact, not liable to execution without further proceedings, if at all (*t*).

A debt due from a firm under a judgment re-
[*267] covered against *it in its mercantile name cannot be attached under the garnishee orders (*u*).

It frequently happens that there are reasons which prevent the joinder as plaintiffs of all who *primâ facie* ought to be joined: in such a case those who cannot be so joined may be made defendants. Thus if a firm has a cause of action, and one member has improperly released it, the other members can nevertheless maintain the action, joining him as a defendant, so that justice may be done both to the plaintiffs and to their opponents (*x*).

Two firms with common partner. — Again, there appears to be no reason why an action should not now be maintained for the recovery of a debt due from one partner to the firm (*y*); nor why, if two firms have a common partner, an action should not be maintained by one firm against the other; not, perhaps, in their mercantile names, but by those members of one firm which are not common to both against the members of the other firm; *e.g.*, if there are two firms, A., B. and C. and A., D. and E. an action may, it is con-

(*s*) Ord. xvi. r. 14.

(*t*) See *Munster v. Cox*, 10 App. Ca. 680, and *infra*, § 3, as to execution.

(*u*) *Walker v. Rooke*, 6 Q. B. D. 631.

(*x*) See the cases in the next note.

(*y*) *Piercy v. Fynney*, 12 Eq. 69; *Taylor v. Midland Rail. Co.*, 28 Beav.

287, and 8 H. L. C. 751, show that suits in equity would lie in these cases in aid of legal rights. See, also, *Luke v. South Kensington Hotel Co.*, 11 Ch. D. 121; *Williamson v. Barbour*, 9 Ch. D. 536, *per* Jessel, M. R.; *Palmer v. Mallet*, 36 Ch. D. 411, a case of a contract by an assistant not to carry on business without the consent of the partners.

ceived, be now maintained by A., B. and C. against D. and E. or by B. and C. against A., D. and E. or *vice versâ* (z).

Defences to actions by partners founded on the conduct of one of them. — As a general principle, what a person has no right to do himself, he cannot acquire a right to do by associating others with him (a). Thus, it being a rule that a trustee cannot claim from his *cestui que trust* compensation for trouble, or loss of time in the execution of the trust, it has been held that if one * of a firm of solic- [*268] itors is a trustee, and the firm acts as solicitors in the matter of the trust, the firm cannot claim payment for its services; the disability of one of its members thus extending to them all (b). So if one member of a firm is guilty of fraud in entering into a contract on behalf of the firm, his fraud may be relied on as a defence to an action on the contract brought by him and his co-partners; for their innocence does not purge his guilt (c). So if one partner resident abroad sells partnership goods, and he knows they are to be smuggled into this country, and he is privy to their being so smuggled, then although his co-partners are innocent, the firm cannot recover the price of such goods (d). So if one of several partners draws a bill in his own name, and the bill is accepted upon condition that he will provide for it when due, he cannot, by indorsing that bill to the firm to which he belongs, entitle himself and his co-partners to sue upon it (e). In *Astley v. Johnson*, one of three partners purchased a bill in the partnership name, and undertook to pay for it at the end of a month. He remitted the bill to

(z) Before the Judicature Acts such actions could not be maintained, *Bosanquet v. Wray*, 6 Taunt. 598; 1 Wms. Saund. 291 *h*. But suits in equity could. See the cases in the last note. See as to the non-application of this rule at law to companies, *Bosanquet v. Woodford*, 5 Q. B. 310. As to estimating damages sustained by one firm by reason of being prevented from completing a contract made with another firm, some members being common to both, see *Waters v. Towers*, 8 Ex. 401.

(a) See, in addition to the cases cited *infra*, *ante*, pp. 116, 117, and *Salomons v. Nissen*, 2 T. R. 674.

(b) See *Broughton v. Broughton*, 2 Sim. & G. 422, and 5 De G. M. & G. 160; *Christophers v. White*, 10 Beav. 523; *Collins v. Carey*, 2 ib. 128; *Matthison v. Clark*, 3 Drew. 3. See the exception in cases of litigation, *Cradock v. Piper*, 1 Me. & G. 664, and *Re Corsellis*, 34 Ch. D. 675.

(c) See *Kilby v. Wilson*, Ry. & Mood. 178.

(d) *Biggs v. Lawrence*, 3 T. R. 454.

(e) *Sparrow v. Chisman*, 9 B. & C. 241; and see *Richmond v. Heapy*, 1 Stark. 202.

his co-partners in England, and they sued upon it. The bill, however, had not been paid for as agreed, and it was held that the plaintiffs were not entitled to recover, and were in no better position without their co-partner than they would have been had he been a co-plaintiff in the action (*f*).

Surviving partners prejudiced by conduct of deceased partner.—In such cases as these the inability of the firm to sue is not removed by the death of the partner who has created the inability. Thus in *Ex parte Bell* (*g*), one of a firm advanced money of the firm to a stranger for an illegal purpose; and it was held, after the death of the partner [*269] who advanced the *money, that the survivors could not recover it from the person to whom it was lent. So if a firm has become bankrupt, its trustee is in general in no better position than the partners themselves would have been in, and is therefore frequently liable to be defeated on similar grounds (*h*). But the trustee of a bankrupt partner can disaffirm and avoid such of his acts as are fraudulent as against his creditors, and consequently acts of this nature afford no defence to an action by the trustee and the solvent partner. Thus in *Heilbut v. Neville* (*i*), a solvent partner and the assignees of a bankrupt partner successfully maintained an action for a bill of the firm, given by the bankrupt to a creditor of his own, under circumstances which amounted to a fraudulent preference.

Frauds by one partner on the firm.—Owing to the old technical rules relating to the joinder of parties to actions, the principle above discussed was, moreover, applied at law to cases where it produced great injustice; viz., to cases where one partner acted in fraud of his co-partners. For example, where a partner pledged partnership property, and in so doing clearly acted beyond the limits of his authority, still, as *he* could not dispute the validity of his own act, it was held at law that he and his co-partners could not recover the property so pledged (*k*). So although a partner has no right to pay his own separate debt by setting it off against a debt due from his creditor to the firm, yet if he actually agreed that

(*f*) *Astley v. Johnson*, 5 H. & N. 137.

(*g*) 1 M. & S. 751. See, also, *Brandon v. Scott*, 7 E. & B. 237, and

compare *Innes v. Stephenson*, 1 Moo. & Rob. 147.

(*h*) *Jones v. Yates*, 9 B. & C. 532.

(*i*) L. R. 4 C. P. 354.

(*k*) *Brownrigg v. Rae*, 5 Ex. 489.

such set-off should be made, and it was made accordingly, it was held at law that he and his co-partners could not afterwards recover the debt due to the firm (*l*). So where a firm of three partners deposited goods upon the terms that they were not to be parted with except on the joint authority of all three partners, and they were nevertheless given up to one of them, it was held at law that the firm could sustain no action for the recovery of the goods (*m*). In such cases, as observed by Lord Tenterden, in *Jones v. Yates* (*n*), there is no instance **“in which a person has been* [*270] *allowed as plaintiff in a court of law to rescind his own act, on the ground that such act was a fraud on some other person; whether the party seeking to do this has sued in his own name only, or jointly with such other person.”*

In such cases as these, however, relief might have been had in equity (*o*): and it is apprehended that the cases at law above referred to can no longer be relied upon; the Judicature Acts having removed the technical difficulties which led to their decision.¹

(*l*) See *Wallace v. Kelsall*, 7 M. & W. 264; *Gordon v. Ellis*, 7 Man. & Gr. 607. Compare *Kendal v. Wood*, L. R. 6 Ex. 243, where the technical difficulty did not arise.

(*m*) *Brandon v. Scott*, 7 E. & B. 234.

(*n*) 9 B. & C. 532, and see *Richmond v. Heapy*, 1 Stark. 202.

(*o*) *Piercy v. Fynney*, 12 Eq. 69; *Midland Counties Rail. Co. v. Taylor*, 8 H. L. C. 751, affirming *Taylor v. Midland Counties Rail. Co.*, 28 Beav. 287.

¹ Except as modified by statutes in some of the states (*ante*, p. 264, note 1) the common-law rule is rigidly adhered to, that all partners must join as plaintiffs and be joined as defendants respectively, in actions to sustain claims in favor of the firm, and in actions against the firm for obligations of the firm.

“The law looks beyond mere names and firms, and sees who are the real parties, and treats them as the persons who are to enforce or defend their contracts.” *Gage v. Rollins*, 10 Met. 354. In this case four persons carried on the ice business under the name of “G. H. & Co.” in one port, and by written articles afterwards formed a partnership with a fifth person under a different firm name, in another port, in the same business, the net profits of which were to be equally divided between the old firm and the partners in the new firm. The defendant made an agreement through a broker, acting as agent for “G. H. & Co.,” to transport a cargo of ice from one port to the other, and the four members of the old firm brought an action for damages for breach of that agreement, and it was held (Shaw, C. J., dissenting) that the action could not be maintained without joining the other partner as plaintiff.

See *ante*, p. 115, note 1. And in addition to cases there cited, see, to the effect that all partners must be joined in actions at law either as plaintiffs or defendants, *Armstrong v. Johnson*, 5 G. & J. 412; *Mexican Mill v. Yellow Jacket Mine*, 4 Nev. 40; *Vinal v. West Virginia Oil Co.*, 110 U. S. 215, 28 L. ed. 124; *Mason v. Eldred*, 6 Wall. 231. 18 L. ed. 783; *Page v. Wolcott*, 15 Gray, 536; *Exchange Bank v. Ford*, 7 Colo. 314.

If a partner in collusion with a debtor to the firm gives him a receipt for his debt although no payment or anything equivalent to payment is made, an action for the recovery of the debt is nevertheless maintainable by the firm, *i.e.*, by the partner giving the receipt and his co-partners (*p*). For a receipt does not preclude the person giving it from showing that the money therein expressed to be received, was not in fact received (*q*), nor does it discharge the debt. Again, a right of set-off which might be pleadable to an action brought by one partner, is not pleadable to an action by him and his co-partners (*r*); nor if one partner covenants not to sue for a partnership debt, will this preclude him from joining with his co-partners in an action for the recovery of that debt (*s*). In each of these cases there is only a right of cross action against the one partner; and although such right might be relied on as a defence to an action by him alone, it is held not to affect the firm to which he belongs.

Result of the decisions. — The conclusion to be drawn from the foregoing cases appears to be that the conduct of one partner affords a defence to an action by him and his co-partners, or by them without him, where they are bound by his act, either by adopting and seeking the benefit [*271] of it (*t*), or upon the ground that it is on *ordinary principles of agency the act of the firm; and binding upon him and his co-partners accordingly. But the cases at law which go further than this cannot, it is submitted, be now relied upon.

Power of one partner to act for the firm. — The power of one partner to act for the firm in legal proceedings, may be conveniently noticed in the present place.

One partner suing in the name of the firm. — A partner may

(*p*) *Henderson v. Wild*, 2 Camp. 561; *Farrar v. Hutchinson*, 9 A. & E. 641.

(*q*) *Skaife v. Jackson*, 5 Dow. & Ry. 290, and 3 B. & C. 421.

(*r*) See *infra*, book ii. ch. 3, § 2.

(*s*) See *Walmsley v. Cooper*, 11 A. & E. 216.

(*t*) As in *Ex parte Bell*, 1 M. & S. 751; *Broughton v. Broughton*, 5 De G. M. & G. 160.

And after dissolution as well. *Fish v. Gates*, 133 Mass. 441.

In equity it is sufficient if all are made parties either as plaintiffs or defendants. *Chipman v. Evans*, 44 Miss. 113.

Dormant and nominal partners may or may not be joined as plaintiffs or defendants. *Ante*, p. 115, note 1. See, also, *Elliott v. Stevens*, 38 N. H. 311; *Cleveland v. Woodward*, 15 Vt. 302; *Sylvester v. Smith*, 9 Mass. 154; *Page v. Brant*, 18 Ill. 37; *Scott v. Conway*, 58 N. Y. 619.

sue in the name of himself and co-partners, without their consent (*u*): but if he sues against their consent, he must indemnify them against the costs (*x*). So, one partner may defend an action brought against the firm, indemnifying the firm against the consequences of so doing, if he acts against the will of the other partners (*y*).

One partner staying proceedings.— But if it is competent for one partner to sue for the firm, it is as competent to any other partner to stay proceedings, or to put an end to the action altogether by means of a release; and although the Court will not allow this to be done by collusion with the defendant, for the purpose of defrauding the other partners of their rights (see *ante*, p. 145), a release will be effectual where there is no fraud in the case.

In *Harwood v. Edwards* (*z*), one of three partners, without the knowledge or consent of the other two, brought an action in his name and theirs for the recovery of a debt due to the firm. The other two afterwards agreed with the defendant that proceedings should be stayed; and the Court held that this agreement bound all three; and proceedings were stayed accordingly, although the partner who promoted the action disputed the validity of the agreement, and, by the partnership articles, it had been agreed between the partners, that one *of them should not give a release [*272] without the assent of the others.

Consenting to arbitration.— If an action is brought for the recovery of a debt due to the firm, one of the partners cannot bind the firm by consenting to a judge's order referring all matters in difference between the plaintiffs and the defendant to arbitration (*a*).

Consenting to judgment, &c.— In an action against a firm it has been held that one partner has no authority to bind the

(*u*) *Whitehead v. Hughes*, 2 Cr. & M. 318; and see *Harwood v. Edwards*, Gow on Part. 65, note, where it was held by Chapple, J., that the action must be considered as brought by all. See below, note (*z*).

(*x*) *Whitehead v. Hughes*, 2 Cr. & M. 318.

(*y*) In *Goodman v. De Beauvoir*, 12 Jur. 989 and 1037, a solicitor employed by a managing committee to defend a suit, was held authorised to enter an appearance for a member

of a provisional committee, who had made the managing committee his agents. See, further, as to the authority of one partner to enter an appearance for his co-partner, *Harrison v. Jackson*, 7 T. R. 207; *Morley v. Strombom*, 3 Bos. & P. 254; *Goldsmith v. Levy*, 4 Taunt. 299. The authority has been doubted in America, see *Hall v. Lanning*, 1 Otto, 160.

(*z*) Gow on Part. 65, note.

(*a*) *Hatton v. Royle*, 3 H. & N. 500.

firm by consenting to an order for judgment against it (*b*); or by giving a *cognovit* to pay the debt and costs (*c*). But a warrant of attorney executed by one partner in the name of the firm with the consent of the other partners, is not invalid, simply because the others have not executed it (*d*).

Costs. — If in an action costs are ordered to be paid to one partner, payment to another partner is not sufficient (*e*).

Service on one partner. — One partner is not the agent of his co-partner, except as to partnership matters; and if one partner is sued in respect of some private affair of his own, he must be proceeded against like any other individual, and service of writs, &c., must be made accordingly, and they must not be left at the place of business of the firm, to be served on the other partners (*f*). And even in proceedings relating to partnership matters, although service on one partner is sometimes held equivalent to service on all, this is not the case where the service is relied on as the foundation of process of contempt, or of any proceedings of a penal nature (*g*).

[*273] * Having made these general observations, it will be convenient to consider, in the first place, the general rules which apply to actions by and against partners, when there has been no change in the firm between the time when the right sought to be enforced accrued, and the time when proceedings are taken to enforce it; and then to consider how far those rules apply or have to be modified when a change has taken place.

(*b*) *Hambridge v. De la Crouée*, 3 C. B. 742. See, also, *Munster v. Cox*, 10 App. Ca. 680.

(*c*) *Rathbone v. Drakeford*, 4 Moo. & P. 57, and 6 Bing. 375.

(*d*) *Brutton v. Burton*, 1 Chitty, 707.

(*e*) *Showler v. Stoakes*, 2 Dowl. & L. 3. But as to payment out of money in Court, see the Sup. Ct. Funds Rules, 1886, r. 63.

(*f*) See *Petty v. Smith*, 2 Y. & J. 111; *Fairlie v. Quin*, 1 Smythe, 189. See as to substituted service, *Leese v. Martin*, 13 Eq. 77, and as to delivering a solicitor's bill of costs, *Eggington v. Cumberledge*, 1 Ex. 271.

(*g*) *Young v. Goodson*, 2 Russ. 255; and see *Moulston v. Wire*, 1 Dowl. & L. 527; *Re Holiday*, 9 Dowl.

1020; *Grant v. Prosser*, Smith & Batty, 95; *Murray v. Moore*, 1 Jo. Ir. Ex. 129; *Nolan v. Fitzgerald*, 2 Ir. Com. Law R. 79; *Kitchen v. Wilson*, 4 C. B. N. S. 483. In *Leese v. Martin*, 13 Eq. 77; *Carrington v. Cantillon*, Bunb. 107; and *Coles v. Gurney*, 1 Madd. 187, service of a bill on one partner was allowed, the other being abroad; and in ejectment against a firm, service on an acting partner is sufficient, *Doe v. Roe*, 9 Dowl. 1039, and in an action against a firm on its promissory note, the order to compute (after judgment by default), need only be served on one of the defendants. *Figgins v. Ward*, 2 Cr. & M. 424; *Carter v. Southall*, 3 M. & W. 128.

2. *Actions by and against partners where no change in the firm has occurred.*

A. *Actions in respect of legal rights.*

(a.) *Actions by the firm.*

Actions ex contractu.

In order to determine who ought to sue on behalf of a firm upon a contract made with it, it is necessary to distinguish between

1. Contracts under seal.
2. Bills of exchange and promissory notes.
3. Other contracts.

1. **Actions by partners on contracts under seal.**—As regards contracts under seal, the old rule was that if such a contract was entered into with one partner only, he alone could sue upon it; and that if it was entered into with more than one partner, all those with whom it was expressly entered into must sue upon it, and no others could, whatever their interest in its performance might be (*h*).¹ But their joinder will now be of no consequence, unless the defendant is prejudiced by it (*i*).

* **Covenant with A. & Co.**—It is apprehended that [*274] a covenant entered into with A., B. & Co., may be sued upon by the persons who, when the covenant was made, constituted that firm.

2. **Actions by partners on bills and notes.**—As regards bills of exchange and promissory notes.¹

(*h*) See the note to *Cabell v. Jefferys*, 2 Str. 1146; *Palmer v. Mal-Vaughan*, 1 Saund. 291, *i*; *Metcalf* let, 36 Ch. D. 411.
v. Ryeroft, 6 M. & S. 75; *Scott v.* (*i*) Ord. xvi. r. 11.
Godwin, 1 Bos. & P. 67; *Vernon v.*

¹ One of several joint obligees cannot bring suit on the obligation. *Calvert v. Bradley*, 16 How. 580, 14 L. ed. 1066; *Farni v. Tesson*, 1 Black. 309, 17 L. ed. 67; *Seymour v. Western R. R. Co.*, 106 U. S. 320, 27 L. ed. 103; *Armstrong v. Robinson*, 5 G. & J. 412; *ante*, p. 177, note 1; *Trott v. Irish*, 1 Allen, 481.

¹ The rule in regard to notes and bills differs from that in reference to other simple contracts, in that the actions must be by or against the parties to the paper, as makers, acceptors, drawers, indorsers, or sureties. *Mynderse v. Snooks*, 53 Barb. 234; *Farmers' Bank v. Bayless*, 35 Mo. 428; *Re Waite*, 1 Lowell, 207; *National Bank of Chemung v. Ingraham*, 58 Barb. 290.

But the holder may sue when indorsed in blank.

Blank indorsements. — If they have been indorsed in blank any person holding them may sue upon them (*k*).

Special indorsements. — When a bill or note is not indorsed in blank, the proper persons to sue upon it are those named in the instrument as drawers, payees, or indorseees, as the case may be (*l*). Whether they are partners or not is of no consequence; and therefore if a bill is drawn in the name of two persons as if they were partners, they ought both to join in an action on the bill, although one of them has no interest in it (*m*). So it is immaterial whether the bill or note relates to partnership matters or not, for if a debtor to a firm makes his promissory note payable to one of the partners only, such one is the proper person to sue on the note (*n*).

Bills in name of A. & Co. — If a bill is drawn by or in favour of a firm in its commercial name the persons who composed the firm when the bill was drawn ought to be plaintiffs (*o*). But they can now sue in their mercantile name (*p*).

Bills accepted for honour. — If one partner in his own name accepts a bill drawn on a stranger for his honour, and pays the bill when due out of the funds of the partnership with the consent of his co-partners, the partner who accepted the bill is the proper person to sue the drawee for indemnity (*q*).

3. Actions by partners on ordinary contracts. — With [*275] respect to other simple contracts, whether written * or verbal, where a contract is entered into with several persons jointly, they should all join in an action upon it (*r*).¹

(*k*) See *Ord v. Portal*, 3 Camp. 239; *Attwood v. Rattenbury*, 6 Moore, 579; *Lowe v. Copestake*, 3 Car. & P. 300. See, also, *Law v. Parnell*, 7 C. B. N. S. 282, in which the manager of a joint-stock bank was held entitled to sue, in his own name, on a bill indorsed in blank and given to him by a customer of the bank on account of advances made by it to him; *Machell v. Kinnear*, 1 Stark. 499, is rendered unimportant by *Ord*, xvi. rr. 1 and 11.

(*l*) See *Pease v. Hirst*, 10 B. & C. 122.

(*m*) *Guidon v. Robson*, 2 Camp. 302. *Sed quare* now. See *Ord*, xvi.

(*n*) *Bawden v. Howell*, 3 Man. & Gr. 638.

(*o*) *McBirney v. Harran*, 5 Ir. Law Rep. 428; *Phelps v. Lyle*, 10 A. & E. 113.

(*p*) *Ante*, p. 265.

(*q*) *Driver v. Burton*, 17 Q. B. 989.

(*r*) 1 Wms. Saund. 291 *k*, and 1 Chitty on Plead. 10-15. Formerly

¹ One partner cannot recover his share of a debt due to the firm in an action at law, prosecuted in his own name against the debtor. *Vinal v. West Virginia Oil Co.*, 110 U. S. 215, 28 L. ed. 124. See also *Fourth Nat. Bk. v. New Orleans and Carrollton R. R. Co.*, 11 Wall. 624, 20 L. ed. 82.

All must join. *Reed v. Hanover Branch R. R.*, 105 Mass. 303; *Fish v. Gates*, 133 Mass. 441. *Ante*, p. 270, note 1.

But if a simple contract, written or verbal, expressed or implied, has been entered into with an agent, it may be sued upon by his principal, even if undisclosed, provided he can show that in point of fact the agent contracted on his behalf (*s*).

All may sue, though not named.—This doctrine is constantly applied in partnership cases; it happens every day that a firm sues on a contract entered into on its behalf by one of its members, and it is not by any means necessary that the person dealing with him should have been aware that the one partner was acting on behalf of himself and other people. The question is, With whom was the contract made in point of law? And the true answer to this question does not by any means entirely depend on the answer to be given to the more simple question, With whom was the contract made in point of fact?

Thus in *Garrett v. Handley* (*t*) all the members of a firm were held entitled to sue on a written guarantee given to one of the partners only, there being evidence to show that the guarantee was intended for the benefit of the firm. So, where a member of a firm of bankers was asked for a loan, and he made it out of the funds of the bank, it was held that an action for the recovery of the money lent was properly brought by all the members of the firm, although the borrower had not requested any loan from the bank (*u*).

So, where one partner * sells goods belonging to the [*276] firm (*x*), or does work (*y*) of the kind he and his co-partners undertake, an action for payment may be maintained by him and them jointly, although the person to whom the goods were sold, or for whom the work was done, knew noth-

mistakes in this respect were fatal, but see now Ord. xvi. r. 11.

(*s*) See *Phelps v. Prothero*, 16 C. B. 370; *Sims v. Bond*, 5 B. & Ad. 389. See, also, *Beckham v. Drake*, 9 M. & W. 79, and 11 ib. 315, noticed *ante*, p. 178, and *Trueman v. Loder*, 11 A. & E. 589, as to suing undisclosed principals on written contracts. Foreign principals, as a rule, do not enter into contracts in this country through agents. The agents here themselves contract as principals, though acting for others. See *Elbinger Actien Gesellschaft v. Claye*,

L. R. 8 Q. B. 313; *Hutton v. Bulloch*, L. R. 8 Q. B. 331, and 9 ib. 572.

(*t*) 4 B. & C. 664. See the same case, 3 B. & C. 462, where an action by the one partner failed. See *Hopkinson v. Smith*, 1 Bing. 13, as to actions by attorneys not retained by the defendant.

(*u*) *Alexander v. Barker*, 2 Cr. & J. 133; *Sims v. Britain*, 4 B. & Ad. 375, and *Sims v. Bond*, 5 ib. 389.

(*x*) *Skinner v. Stocks*, 4 B. & A. 437.

(*y*) *Townsend v. Neale*, 2 Camp. 189; *Arden v. Tucker*, 4 B. & Ad. 817.

ing of the other partners. In *Cooke v. Seeley (z)*, a partner had an account at a bank in his own name, but there was evidence to show that it was a partnership account, and was known to the bankers to be so, and under these circumstances it was held that all the partners were entitled to sue the bankers for dishonouring a cheque drawn on them by the one partner for partnership purposes.

Dormant partners.—It follows from the principle on which these cases were decided, and although formerly doubted (*a*), it is now clearly established, that dormant partners may join as plaintiffs in an action on a contract entered into on behalf of the firm of which they are members (*b*).¹

But a dormant partner never *need* be joined as a co-plaintiff in an action on a contract entered into with the firm or with one of its members (*c*).

Position of nominal partners.—*Nominal* partners, *i.e.*, persons who are not entitled to share the profits of the firm, but whose names appear and are used as if they were, never need join as plaintiffs in an action on an ordinary contract not under seal (*d*).² If a partner retires, and leaves his name in the firm, it is not necessary that he should be a co-plaintiff in an action brought by the continuing partners in respect of what has happened since the retirement (*e*).

Where nominal partners must sue.—But if a nominal partner's name is on a bill of exchange or promissory note, [*277] he ought to be a party to the action brought *upon it; and the same rule applies to actions on contracts under seal (*f*).

Actions by one partner.—One partner may sue alone on a written contract made with himself if it does not appear from the contract itself that he was acting as agent of the

(z) 2 Ex. 746.

(a) See *Mawman v. Gillett*, 2 Taunt. 325; *Lloyd v. Archbowle*, ib. 324.

(b) *Cothay v. Fennell*, 10 B. & C. 671. See, also, *ante*, notes (s) and (t); *Robson v. Drummond*, 2 B. & Ad. 303, *per* Littledale, J.

(c) *Leveck v. Shafto*, 2 Esp. 468, action for work and labor. See

Phelps v. Lyle, 10 A. & E. 113, as to contracts with the "directors" of a company.

(d) *Kell v. Nainby*, 10 B. & C. 20. See, also, *Spurr v. Cass*, L. R. 5 Q. B. 656, where the contract was in writing and with the nominal partner.

(e) *Cox v. Hubbard*, 4 C. B. 317.

(f) *Guidon v. Robinson*, 2 Camp. 302.

¹ See *ante*, p. 115, note 1.

² See *ante*, p. 115, note 1.

firm (*g*) ; and one partner ought to sue alone on a contract entered into with himself, if such contract is in fact made with him as a principal, and not on behalf of himself and others. Therefore, if each of several partners lends money out of his own funds, each ought to sue alone for repayment of his advance, although the loans may have been made in pursuance of some arrangement with all the partners ; for each loan creates a separate debt to each partner, and the several loans do not together form one debt to the firm (*h*). Again, if one partner alone holds a certain office and does work in his official capacity, he alone ought to sue for payment of the work so done (*i*).

Covenant with one partner.— Again, if a partner enters into a contract under seal for the payment of money, and the money is paid out of the funds of the firm, and it then appears that the contract was invalid on the ground of fraud, the partner who entered into the covenant may sue alone for the recovery back of the money (*k*). Lastly, if one partner acting for the firm has represented himself to be acting on his own account only, and has ostensibly entered into a contract on his own account, he alone ought to sue on it (*l*).

The Judicature acts and the rules promulgated under them have rendered it comparatively unimportant to consider whether *in any given case all partners [*278] who can sue must do so, and whether an action should be brought in the name of one partner or of all ; for mistakes on such matters are no longer fatal to an action. At the same time mistakes create delay and expense, and attention ought therefore still to be paid to the points above adverted to ; and if all the members of a firm sue when one only ought to do so, or one only sues when all ought to do

(*g*) See *Skinner v. Stocks*, 4 B. & A. 437, and *Cothay v. Fennell*, 10 B. & C. 671. See, also, *Cawthron v. Trickett*, 15 C. B. N. S. 754, as to actions by a master and part-owner of a ship, on bills of lading, and *Agacio v. Forbes*, 14 Moo. P. C. 160, in the privy council, where it was held that one partner might maintain an action upon an agreement in writing made with him alone, although the agreement related to the business of the firm, and was, in truth, for its

benefit, and the consideration was a release by the partner in question of a debt due to the firm.

(*h*) See *Thacker v. Shepherd*, 2 Chitty, 652 ; *Brand v. Boulcott*, 3 Bos. & P. 235.

(*i*) *Brandon v. Hubbard*, 2 Brod. & Bing. 11.

(*k*) *Lefevre v. Boyle*, 3 B. & Ad. 877.

(*l*) *Lucas v. De la Cour*, 1 M. & S. 249.

so, and the defendant can show that he is thereby prejudiced, he can apply to have the improper parties struck out or the proper parties joined, as the case may be (*m*).

Actions ex delicto.

Actions by partners for torts.— With respect to actions by partners not founded on any breach of contract, or of *quasi* contract, but on some tort, the general principle is that where a joint damage accrues to several persons from a tort, they ought all to join in an action founded upon it (*n*); whilst on the other hand several persons ought not to join in an action *ex delicto*, unless they can show a joint damage (*o*).¹

Actions for libel.— These doctrines are well illustrated by actions for libel. A libel on a firm can be made the subject of an action by the firm (*p*). If the libel reflects directly on one partner, and through him on the firm, two actions will lie, viz., one by the party libelled, and the other by him and his co-partners (*q*): but the damage in the first action must not appear to be joint, nor must that in the second appear to be confined to the libelled partner only (*r*). If one partner is libelled, and the firm cannot be shown to have been damaged, an action for the libel should be brought in the name of the individual partner [*279] *aggrieved, and not by the firm (*s*); and he may sue alone, although the libel more particularly affects him in the way of his business (*t*). Moreover, a general statement not clearly pointing to any particular person, but libellous as to an entire class, may be treated by any indi-

(*m*) See Ord. xvi. r. 11.

(*n*) See 1 Wms. Saund. 291, *m*;
Addison v. Overend, 6 T. R. 766;
Sedgworth v. Overend, 7 T. R. 279.

(*o*) 2 Wms. Saund. 116, *a*.

(*p*) See Cooke v. Batchellor, 3 Bos. & P. 150; Forster v. Lawson, 3 Bing. 452; Williams v. Beaumont, 10 Bing. 260; The Metropolitan Saloon Omnibus Co. v. Hawkins, 4 H. & N. 87.

(*q*) The two actions can now be combined in one. See Ord. xviii. r. 6.

(*r*) See Harrison v. Bevington, 8 C. & P. 708; and Forster v. Lawson, 3 Bing. 452; 2 Wms. Saund. 117, *b*; Haythorne v. Lawson, 3 C. & P. 196.

(*s*) Solomons v. Medex, 1 Stark. 191.

(*t*) Harrison v. Bevington, 8 C. & P. 708; Robinson v. Marchant, 7 Q. B. 918.

¹ See Bohm v. Dunphy, 1 Mont. 333; Medbury v. Watson, 6 Met. 246; Trott v. Irish, 1 Allen, 481; Robinson v. Mansfield, 13 Pick. 139; Duffly v. Gray, 52 Mo. 528; Noonan v. Orton, 32 Wis. 106; Fidler v. Delavan, 20 Wend. 57; Donnell v. Jones, 13 Ala. 490.

vidual of that class, who can show that he was in fact intended, as a libel on himself; and this principle is as applicable to libels affecting a firm as to those affecting single individuals (*u*).

Consequence of non-joinder of partners.—An action for the recovery of goods of the firm, or for damages for their loss or injury ought to be brought in the name of the firm or by all its members (*x*): but if one only sues he will be entitled to recover damages in respect of his interest in the goods (*x*); and if, after he has done so, another action is brought by one of his co-partners, that action cannot be stopped (*y*).

Actions where one partner colludes with defendant.—If a person colludes with one partner in a firm to injure the other partners, the latter can jointly sustain an action against such person. Thus, where the bankers of a firm of four partners knew that one of them was in the habit of drawing bills in the name of the firm for his own private purposes, and the bankers colluded with him and kept his co-partners in ignorance of what was going forward, and paid the funds when due out of the funds standing to the credit of the firm, it was held that an action lay against the bankers at the suit of the other three partners (*z*).

Actions of ejectment.—An action of ejectment for the recovery of real property belonging to the firm ought to be brought in the names of all those persons in whom the legal estate is vested (*a*). If, however, one partner only has made a lease of the partnership property, then as his title cannot be disputed by the lessee, notice to quit may be given and ejectment maintained * by the lessor [*280] alone: and if he alone has the legal estate, the circumstances that rent has been paid to the firm, and receipts for it have been given by all the partners, will not affect his right to give the notice and bring the action in his own name (*b*).

(*u*) *Le Fanu v. Malcolmson*, 1 H. L. C. 637.

(*x*) See *Addison v. Overend*, 6 T. R. 766; *Bleaden v. Hancock*, 4 Car. & P. 152. See *Dockway v. Dickenson*, Comb. 366.

(*y*) *Sedgworth v. Overend*, 7 T. R. 279.

(*z*) *Longman v. Pole, Moo. & Mal. 223*. Now the other partner might be joined as a defendant. See *ante*, p. 267, note (*y*).

(*a*) See 1 Chitty on Plead. 74.

(*b*) See *Doe v. Baker*, 2 B. Moore, 189.

(b.) Actions against the firm.

Actions against partners. — In considering who ought to be sued in respect of a breach of contract committed by a firm, or some or one of its members, regard must be had in the first instance, to the persons upon whom that contract is legally binding. This matter has been already discussed at length in the first and second chapters of the present book, and it is needless to repeat what has there been said. Assuming, therefore, the question of liability to be determined, it remains only to consider whether all the persons who are liable ought to be sued jointly, or whether any and which of them may be sued without the others. If there is any doubt on this question the proper way is to sue them all; for this is now expressly authorised to be done (*c*). In order, however, to save expense, the following rules will be found useful.

Actions ex contractu.

Actions against partners on contracts. — All persons who are jointly liable on a contract ought to be sued jointly (*d*), unless some of them are abroad (*e*). This rule applies to actions against partners for the recovery of penalties imposed upon them by statute (*f*), and to actions in form *ex delicto*, but founded in substance on a breach of contract express or implied (*g*): but it is subject to certain real or apparent exceptions which require notice.¹

Actions against infant partners. — In the first place an infant

(*c*) Ord. xvi. rr. 1, 4. *Honduras Rail. Co. v. Tucker*, 2 Ex. D. 301. See, also, Ord. xxi. r. 20, abolishing pleas in abatement.

(*d*) See the note to *Cabell v. Vaughan*, 1 Wms. Saund. 291 *b*; *Byers v. Dobey*, 1 H. Blacks. 236; *Bonfield v. Smith*, 12 M. & W. 405; *Pilley v. Robinson*, 20 Q. B. D. 155.

(*e*) See 3 & 4 Wm. 4, c. 42, § 8; *Joll v. Lord Curzon*, 4 C. B. 249. See before this statute, *Sheppard v. Baillie*, 6 T. R. 327.

(*f*) *Bristow v. James*, 7 T. R. 257. (*g*) *Powell v. Layton*, 2 Bos. & P. N. R. 365; *Buddle v. Willson*, 6 T. R. 369.

¹ See, for authorities to sustain the general rule, *ante*, pp. 115 and 270, and notes.

See also note 1, p. 264, as to statutory modifications of the rule in some of the states, and that where the firm name may be used as plaintiff an action will lie against the partnership by its firm name. See also *Shapard v. Lightfoot*, 56 Ala. 506; *Burlington & Missouri River R. R. Co. v. Dick*, 7 Neb. 242; *Newlon v. Heaton*, 42 Iowa, 593; *White v. Tudor*, 32 Tex. 758; *Hicks v. Branton*, 21 Ark. 186; *Snow v. Howard*, 35 Barb. 55; *Way v. Fravel*, 61 Ind. 162.

partner, not being bound by any *contract entered [*281] into by or on behalf of the firm, ought not to be joined as a defendant in an action on any such contract (*h*).

Actions against dormant partners. — Secondly, as regards dormant partners. It has been seen that they are liable on all contracts entered into on behalf of the firm to which they belong, and whether such a contract is written or unwritten, express or implied, it is clear that a dormant partner may be sued upon it (*i*). Dormant partners, moreover, ought to be made co-defendants in an action on a contract binding the firm (*k*).¹ But a person who holds himself out to another, as the only person with whom that other is dealing, cannot be allowed afterwards to say that such other was also dealing with somebody else (*l*).

One partner liable if others are not disclosed. — If, therefore, a person carries on business in his own name, and incurs debts in so doing, he may be properly sued alone for such debts (*m*). The same rule holds whenever a partner enters into a written contract in which he does not disclose the fact that he is acting for other people; for although they may be sued, he cannot insist that they shall be sued (*n*).

Statutory exceptions to general rule. — Thirdly, to the gen-

(*h*) See 1 Wms. Saund. 207 *a*; *Chandler v. Danks*, 3 Esp. 76; *Burgess v. Merrill*, 4 Taunt. 468; *Jaffray v. Frebain*, 5 Esp. 47. Formerly it was thought that an infant partner ought to be made a co-defendant. See *Ex parte Henderson*, 4 Ves. 164; *Gibbs v. Merrill*, 3 Taunt. 307.

(*i*) *Robinson v. Wilkinson*, 3 Price, 538; *Beckham v. Drake*, 9 M. & W. 79, and 11 ib. 315, overruling *Beckham v. Knight*, 4 Bing. N. C. 234, and see *ante*, p. 178. Of course if a person is sued on the ground that he is a dormant partner, that fact must be proved, for otherwise no case will be made against him. See *Hall v. Bainbridge*, 8 Dowl. 583.

(*k*) See *Bonfield v. Smith*, 12 M. & W. 405; *Dubois v. Ludert*, 5 Taunt. 609, where it was held that a dormant

partner ought to be joined. See *ante*, *Kendall v. Hamilton*, p. 193, note (*k*).

(*l*) See *De Mautort v. Saunders*, 1 B. & Ad. 398; *Stansfeld v. Levy*, 3 Stark. 8. Whether a defendant has so held himself out is a question for the jury. Compare the cases in the last note.

(*m*) See, in addition to the cases cited in the last note, *Mullett v. Hoek*, Moo. & Mal. 88; *Baldney v. Ritchie*, 1 Stark. 338; *Doo v. Chippenden*, *Abbott on Shipping*, 84; *Colson v. Selby*, 1 Esp. 452. *Dubois v. Ludert*, 5 Taunt. 609, is the other way, but cannot, it is conceived, be supported.

(*n*) See *Higgins v. Senior*, 8 M. & W. 834, where the plaintiff knew the defendant was acting as agent.

¹ A dormant partner may be joined as defendant or not. *Leslie v. Wiley*, 47 N. Y. 648; *Wood v. Cullen*, 13 Minn. 394; *Chase v. Denning*, 42 N. H. 274; *Wright v. Herriek*, 125 Mass. 154; *Hatch v. Wood*, 43 N. H. 633; *Hopkins v. Kent*, 17 Md. 72; *Carey v. Bright*, 58 Penn. St. 70; *Blin v. Pierce*, 20 Vt. 25.

eral rule that all persons jointly liable on a contract ought to be sued jointly, there are a few statutory exceptions. Thus,

by the Carriers act, a person sued as a common carrier, and not on any special agreement, cannot *require his co-partners to be joined (*o*): and by the Companies act, 1862, members of a registered company, who know that it has carried on business for more than six months with less than seven members, are severally liable for the debts of the company contracted after such six months, and cannot require the other members to be joined (*p*).

Actions on joint and several contracts. — With respect to joint and several contracts, the rule now is that all persons liable on them may be sued jointly or separately, or in the alternative in one action (*q*).

Actions on contracts not binding on firm. — The previous remarks have been addressed to the case of actions on contracts binding the firm. But a contract may be entered into by a partner and not bind the firm, either because it was not entered into on behalf of the firm, or because if it was, the partner entering into it exceeded his authority express and implied. In such cases the old rule was that the partner contracting, and no one else, ought to be sued. If he contracted as a principal, he ought to be sued on the contract; whilst, if he contracted as an agent, he ought to be sued as having done so without authority (*r*). If a partner entered into a contract on behalf of the firm, but exceeded his authority, and the contract did not bind the firm, and the firm repudiated it, the partner contracting, and not the firm, ought to have been sued for money paid to him under it, and sought to be recovered back (*s*). But now in cases of this description, whenever there is any doubt as to who ought to be sued, the prudent course is to sue all the partners, and so to frame the statement of claim as to be able to obtain judgment against the right persons according to the evidence on the trial (*t*).

(*o*) 11 Geo. 4 & 1 Will. 4, c. 68, §§ 5, 6.

(*p*) 25 & 26 Vict. c. 89, § 48.

(*q*) Ord. xvi. rr. 1, 4, 6. See, as to the old law, the note to *Cabell v. Vaughan*, 1 Wms. Saund. 291 *g*; and as to staying one action, when the creditor has been satisfied in another,

see *Carne v. Legh*, 6 B. & C. 124; *Nesbit v. Howe*, 8 Ir. Law Rep. 273.

(*r*) See *Lewis v. Nicholson*, 18 Q. B. 503.

(*s*) See *Hudson v. Robinson*, 4 M. & S. 475.

(*t*) See Ord. xvi. r. 1. *Honduras Rail. Co. v. Tucker*, 2 Ex. D. 301.

* *Actions ex delicto.*

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Actions of tort against partners.—It is not every tort which though committed by several persons acting together, is legally imputable to them all jointly (*u*); but supposing a tort to be imputable to a firm, an action in respect of it may be brought against all or any of the partners. If some of them only are sued, they cannot insist upon the other partners being joined as defendants (*x*), and this rule applies even where the tort in question is committed by an agent or servant of the firm, and not otherwise by the firm itself (*y*).¹ But there is a distinction between ordinary actions of tort, and those which are brought against persons in respect of their common interest in land; for all joint tenants, or tenants in common ought to be joined in an action for an injury arising from the state of their land (*z*); and this rule applies to partners as well as to persons who are not partners.

B. *Actions in respect of equitable rights.*

Parties to actions in the Chancery Division.—Actions by and against partnerships for the specific performance or the rescission of contracts, for taking agency accounts, as well as in respect of frauds, breaches of trust, and other matters, are by no means unusual; and an action by a creditor of a firm to obtain payment out of the estate of a deceased partner, is a matter of almost daily occurrence (*a*).²

(*u*) See 2 Wms. Saund. 117, *b* and *c*; 1 Chitty, Plead. 96–7.

(*x*) Sutton *v.* Clarke, 6 Taunt. 29.

(*y*) Mitchell *v.* Tarbutt, 5 T. R. 649; Ansell *v.* Waterhouse, 6 M. & S. 385.

(*z*) 1 Wms. Saund. 298, *f* and *g*, and Mitchell *v.* Tarbutt, 5 T. R. 649.

(*a*) See, on this subject, book iv. ch. 3.

¹ There is a distinction between torts in the course of the business of the partnership and torts outside the scope of the business. In the latter case there is no firm liability (*Durant v. Rogers*, 87 Ill. 508; *Champion v. Bostwick*, 18 Wend. 175), while in the cases of torts committed in the course of business, by agents or members of the firm, all the members may be liable, though they need not be joined as defendants. *Howe v. Shaw*, 56 Me. 291; *Linton v. Hurley*, 14 Gray, 191; *Wood v. Luscomb*, 23 Wis. 287; *Durant v. Rogers*, *supra*; *Pierce v. Wood*, 23 N. H. 519; *Vanderburg v. Bassett*, 4 Minn. 242; *Lothrop v. Adams*, 133 Mass. 471; *Strang v. Bradner*, 114 U. S. 561, 29 L. ed. 250; *Stockwell v. United States*, 13 Wall. 531, 20 L. ed. 491.

² It is every-day practice for courts of equity to entertain jurisdiction for the settlement of partnership affairs by receiverships and suits for account,

As a general rule an action in the Chancery Division by or against an ordinary partnership will be defective for want of parties, unless all the partners are before the Court. But it was early held, that where some partners are abroad, a suit against those who remain may be prosecuted with effect, and a decree be obtained against them for payment of the whole of the amount due from the firm (*b*).

All the members of a firm ought to be parties to [*284] an action *for a general account (*c*);¹ and in an action for payment of a partnership debt out of the assets of a deceased partner the surviving partners ought to be parties (*d*). But if the ground of action is fraud it is not necessary to join a partner not implicated in it and not sought to be made liable (*e*).

(*b*) See *Darwent v. Walton*, 2 Atk. 510; *Cowslad v. Cely*, Prec. in Chanc. 83; and see *Orr v. Chase*, 1 Mer. 729.

(*c*) *Coppard v. Allen*, 2 De G. J. & S. 173.

(*d*) *Ex parte Hodgson*, 31 Ch. D. 177; *Hills v. McRae*, 9 Ha. 297. See, also, *infra*, book iv. ch. 3, § 2.

(*e*) See *Plummer v. Gregory*, 18 Eq. 621; *Atkinson v. Mackreth*, 2 Eq. 570.

and where equity obtains jurisdiction of the parties and subject-matter, it will deal with the rights of all parties and furnish relief.

Whether, however, a receiver will be appointed to take jurisdiction of assets out of the jurisdiction of the courts is a question upon which the authorities disagree. In *Harvey v. Varney*, 104 Mass. 436, the court refused to appoint a receiver to take charge of a branch concern in Indiana. See *Booth v. Clark*, 17 How. 322, 15 L. ed. 164; *Atkins v. Wabash*, St. Louis & Pacific R. R. Co., 29 Fed. Rep. 161; *Griggs v. Clark*, 23 Cal. 427; *Wright v. Ward*, 65 Cal. 525.

Where parties in interest are personally before the court and subject to its orders, the court may thereby get jurisdiction over foreign assets. High, Rec. § 44; *Lyman v. Lyman*, 2 Paine, C. C. 11.

Equity will correct mistakes in partnership settlements. *Merriweather v. Hardiman*, 51 Tex. 436; *Stevens v. Orman*, 10 Fla. 9.

¹ "Persons who are out of the jurisdiction, and are ordinarily proper and necessary parties, can be dispensed with only when their interests will not be prejudiced by the decrees, and when they are not indispensable to the just ascertainment of the merits of the cases before the court." Story, Eq. Pl. § 81; *Wright v. Ward*, 65 Cal. 515; *Cassidy v. Shimmmin*, 122 Mass. 406; *Towle v. Pierce*, 15 Met. 329; *Palmer v. Stevens*, 100 Mass. 461.

Generally, all partners must be joined in a writ for accounting either as plaintiffs or defendants, and this extends to assignees, trustees, and personal representatives of partners. *Raymond v. Came*, 45 N. H. 201; *Settembre v. Putnam* (mining partnership), 30 Cal. 490; *Westphal v. Henney*, 49 Iowa, 542, where a married woman was member of a firm, and petitioner sought to subject her interest to the payment of her husband's debts. See also, *Elmendorf v. Taylor*, 14 Wheaton, 152 (co-tenants); *Ward v. Arredondo*, 1 Paine, C. C. 410; *Jenness v. Smith*, 58 Mich. 280 (deceased partner); *Robertshaw v. Hanway*, 52 Miss. 713.

Actions against agents.—An agent of the firm may be sued for an account by all the partners, although he only knew of one of them, and was employed by and has transacted business with that one alone (*f*). At the same time, an agent is only liable to account to his principal; and therefore if a person has been employed by one partner only as principal, or has been induced by that partner to believe that he alone was the principal, in such a case the other partners have no right to call the person so employed to account with them (*g*). On the other hand, if a person has throughout dealt with some partners only, and has all along treated them as principals, he can be compelled by them to account, and he cannot successfully insist that the other partners ought to be parties to the action (*h*).

Actions by surviving partner.—A surviving partner may sue an agent of the firm for an account without making the executors of the deceased partner parties (*i*); for the surviving partners are the proper persons to get in and give receipts for debts owing to the firm (*k*).

3. *Actions by and against partners where a change in the firm has occurred.*

Effect of change in firm on actions by and against it.—In the preceding remarks upon the persons who ought to sue and be sued when a right is sought to be enforced by or against a firm, it has been assumed that no change in the members of the firm has occurred between the period when the right in *question accrued and the time [*285] when the action to enforce it is brought. It is proposed now to consider to what extent the rules above established require modification, when some such change has taken place by reason either of the introduction of a new partner, or of the retirement, death, or bankruptcy of an old one.

First, with respect to changes caused by the introduction of new partners and the retirement of old ones.

(*f*) See *Killock v. Greg*, 4 Russ. 285; *Anon.*, Godb. 90. and see *Aspenwall v. The London & N.-W. Rail. Co.*, 11 Ha. 325.

(*g*) See *Killock v. Greg*, 4 Russ. 285; *Maxwell v. Greig*, 1 Coop. Ca. 491. in Ch. 491. (*i*) *Haig v. Gray*, 3 De G. & Sm. 741.

(*k*) *Benson v. Hadfield*, 4 Ha. 32; 281; *Brasier v. Hudson*, 9 Sim. 1.

Alterations made by Judicature acts.—By § 25, cl. 6 of the Judicature act, 1873, debts may now be assigned by writing and notice to the debtor so as to entitle the assignee to sue for them in his own name. Consequently, if on the introduction of a new partner or the retirement of an old partner the debts due to the old firm are thus assigned to the new firm, the new firm can sue in respect of them, either in its mercantile name or in the names of its members. Again, a new partner may, it is apprehended, always be joined in an action to recover a debt or enforce a demand in which he has an interest, provided his joinder does not prejudice the rights of the defendants. Further, if an incoming partner has agreed with his co-partners to take upon himself the debts and liabilities of the old firm, they can require him to be made a defendant for their own partial indemnity (*l*).

When new partner can be sued.—Except, however, in these cases an incoming partner can neither sue nor be sued in respect of a liability of the old firm, unless there is some agreement express or implied between himself and the person suing him or being sued by him (*m*).¹

As regards negotiable instruments, indeed, any persons who can agree to sue jointly upon them may do so, provided the instrument is in such a state as to pass by delivery; therefore, if a bill or note, indorsed in blank, is given to a firm consisting of certain individuals, who afterwards take in a new partner, they and he, or some or one of them, may sue on that bill or note (*n*).²

[*286] *** Effect of retirement of old partner.**—So, as regards changes occasioned by the retirement of a partner. It has been already shown, that the retirement of a partner in no way affects his rights against or obligations to strangers in respect of past transactions. Subject, therefore, to the

(*l*) Ord. xvi. rr. 48 and *seq.*

(*m*) See, accordingly, *Wilsford v. Wood*, 1 Esp. 182; *Ord v. Portal*, 3 Camp. 239, note; *Waters v. Paynter*, *Chitty on Bills*, 406, note 5, ed. 10; *Vere v. Ashby*, 10 B. & C. 288; *Young*

v. Hunter, 4 Taunt. 582. See *Radenhurst v. Bates*, 3 Bing. 463. See *ante*, book ii. ch. 2, § 3.

(*n*) See *Ord v. Portal*, 3 Camp. 239, and *ante*, p. 274.

¹ See *White v. White*, 5 Gill. 359; *Ayrault v. Chamberlin*, 26 Barb. 83; *Shorter v. Hightower*, 48 Ala. 526; *Shoemaker Piano Co. v. Bernard*, 2 Lea, 358.

² See *ante*, p. 274, note 1.

above observations, a retired partner ought to join as a plaintiff, and be joined as a defendant, in every action to which, had he not retired, he would have been a necessary party. This rule holds good, even where a contract is entered into before, and the breach of it occurs after the retirement of a partner (*o*). In one case, indeed, it was held at Nisi Prius that where two partners sold goods, and they afterwards dissolved partnership, an action for the price of those goods was sustainable by the one partner who continued to carry on the business of the late firm (*p*); but the propriety of this decision is more than questionable. Whether, however, it is now necessary to join as a plaintiff a retired partner against whom the defendant has no claim and who has no beneficial interest in what is sought to be recovered admits of some doubt.

Sometimes one partner retires and a new partner comes in, and an agent of the firm, in ignorance of the change which has occurred, enters into a contract on behalf of the firm; in such a case the members of the new firm may sue on the contract, unless the defendant is prejudiced by their so doing (*q*). The liability of the retired partner on such a contract, will, however, cease if the creditor sues the new firm and recovers judgment against it (*r*).

Fresh contract.—And a new firm may sue or be sued in respect of a fresh contract entered into by or with it to pay a debt owing to or by an old firm. Thus, where A. was indebted to B., and afterwards C. entered into partnership with B., and A. contracted a further debt with both, and then settled an account with both, as well upon what was due to B. before his partnership with C., as upon the debt contracted afterwards, it was held that B. and * C. [*287] might join in an action of assumpsit on an account stated, and recover the whole debt (*s*).

Change in firm may prevent it from suing.—Although a change in a firm, whether by the introduction of a new partner or the retirement of an old one, cannot, except as already

(*o*) See *Dobbin v. Foster*, 1 Car. & K. 323.

(*p*) *Atkinson v. Laing, Dowl. & Ry.* N. P. Ca. 16.

(*q*) *Mitchell v. Lapage*, Holt, N.

P. Ca. 253. But see *Boulton v. Jones*, 2 H. & N. 564.

(*r*) See *Scarfe v. Jardine*, 7 App. Ca. 345, noticed *ante*, pp. 46 and 197.

(*s*) *Moor v. Hill, Peake, Add. Cases*, 10.

mentioned confer upon the partners any new right of action against strangers, or *vice versâ*, as regards what may have occurred before the change took place, it may, nevertheless operate so as to discharge a person from a contract previously entered into by him. Thus, as was pointed out in the sixth chapter of the first book (*t*), a person who is surety to a firm is discharged from his suretyship, for the future, by a change amongst its members, and cannot, therefore, be sued either by the old or by the new partners for any default of the principal debtor occurring subsequently to the change. Again, if a person enters into a contract with a firm, and that contract is of a purely personal character, to be performed by the individuals who have entered into it, and not by any one else, a change in the firm may operate as a dissolution of the contract, so that neither the new nor the old partners can sue in respect of any alleged breach which may have occurred since the change took place. An illustration of this is afforded by *Robson v. Drummond* (*u*). In that case A. and B. were partners as coachmakers. C., who knew nothing of B., entered into a contract with A. for the hire of a carriage for five years, at so much a-year, and A. undertook to keep the carriage in proper order for the whole five years. Before the five years were out, A. and B. dissolved partnership, and A. assigned the carriage and the benefit of the contract relating to it to B. B. gave C. notice of the dissolution and arrangement respecting the carriage; but C. declined to continue the contract with B., and returned the carriage. An action was then brought by A. and B. against C., for not performing the contract; but it was held that the action would not lie, the contract having been with A. alone, to be performed by him personally, and he

having disabled himself from continuing to perform [*288] it on his *part. In *Stevens v. Benning* (*x*), the same principle was applied to a contract between an author and a firm of publishers; and it was held that the contract was one of a personal character, and that consequently the author was discharged from it by a change in the firm, and

(*t*) *Ante*, p. 117.

(*u*) 2 B. & Ad. 303. Compare & G. 223. See, also, *Hole v. Bradbury*, 12 Ch. D. 886.

D. 149.

an assignment of the benefit of the contract to persons of whom the author knew nothing.

Effect of death.—Secondly, with respect to changes caused by death. Before the Judicature acts, when a partner died in the lifetime of any one or more of his co-partners, all actions brought in respect of any contract entered into by or on behalf of the firm before his death, must have been brought by or against the surviving members of the firm, and by or against them alone; for the representatives of the deceased partner could neither sue nor be sued at law in respect of any such contract (*y*). So an action for the conversion of partnership goods must have been brought by the surviving partners (*z*).

Actions by and against surviving partners.—It followed from the above rule that the last surviving partner, or if he was dead his legal personal representative, was the proper person to sue and be sued at law in respect of the debts and engagements of the firm (*a*).

These rules, however, can be no longer relied upon, except where the obligation sought to be enforced is joint in equity as well as at law. Wherever it is several as well as joint (*b*), an action may, it is apprehended, be brought by or against the surviving partners and the executors or administrators of the deceased partner (*c*).

Effect of bankruptcy.—Lastly, with respect to changes caused by bankruptcy. *Formerly, if a [*289] partner was bankrupt, his assignees were required to join in his stead in any action in which, had no bankruptcy intervened, the bankrupt himself would have been necessarily joined as a plaintiff (*d*). If the assignees declined to join, the solvent partners were entitled to make use of their

(*y*) *Dixon v. Hammond*, 2 B. & A. 310, which shows that an agent of the firm must account to the surviving partners. See, too, *Martin v. Crompe*, 1 Ld. Raym. 340, and 2 Salk. 444; and *Webber v. Tyvill*, 2 Wms. Saund. 121 *e*. Formerly this was otherwise, see the authorities collected in *Buckley v. Barber*, 6 Ex. 178.

(*z*) *Kemp v. Andrews*, Carth. 170; but see *Buckley v. Barber*, 6 Ex. 164. An indictment for stealing them may be preferred by the surviving part-

ners, and the next of kin of the deceased partner. *R. v. Gaby*, Russ. & Ry. 178; *R. v. Scott*, ib. 13.

(*a*) *Richards v. Heather*, 1 B. & A. 29; *Calder v. Rutherford*, 3 Brod. & Bing. 302.

(*b*) As to which, see *ante*, p. 194.

(*c*) Ord. xvi. rr. 1, 4, 6, 8.

(*d*) *Eckhardt v. Wilson*, 8 T. R. 140; *Thomason v. Frere*, 10 East, 418; *Graham v. Robertson*, 2 T. R. 282.

names upon indemnifying them against the costs of the action (*e*). If all the partners were bankrupt, any action which it would have been necessary to bring in the names of all the partners, if bankruptcy had not intervened, must have been brought by their assignees (*f*). But this was subject to the qualification that bankrupts, whether partners or not, might sue in their own names as trustees for other people (*g*). By the Bankruptcy act, 1883, a bankrupt partner is not required to join the solvent partners in suing on a joint contract made with the firm (*h*): and it is presumed that the trustee of the bankrupt partner need not be joined in such a case. But the trustee may join in the action if authorised to do so by the Bankruptcy Court (*i*); and his joinder is necessary where an act of the bankrupt is sought to be impeached (*k*).

Actions against bankrupt.—As regards actions against a firm, one or more of the members of which have become bankrupt, it need hardly be observed that there is no remedy by action against trustees in respect of liabilities of the bankrupt they represent. The only remedy is by proof against his estate, or by proof and by an action against him if he has not obtained his order of discharge, or if his order of discharge is no bar. When, therefore, it is desired to recover a debt due from a firm, and all the partners are bankrupt, an action is not the remedy unless the partners have not obtained their discharge, or unless the debt could not have been proved in bankruptcy. If, however, some only [*290] of * the partners are bankrupt, the solvent partners only need be sued (*l*); and the Court of Bankruptcy can restrain an action against the bankrupt partner (*m*).

(*e*) *Whitehead v. Hughes*, 2 Cr. & M. 318.

(*f*) See *Ray v. Davies*, 8 Taunt. 134. The trustee of a firm may sue for debts owing to the members thereof individually. *Stonehouse v. De Silva*, 3 Camp. 399; *Hancock v. Haywood*, 3 T. R. 433; *Scott v. Franklin*, 15 East, 428.

(*g*) See *Castelli v. Boddington*, 1

E. & B. 66; *Winch v. Keeley*, 1 T. R. 619.

(*h*) See 46 & 47 Vict. c. 52, § 114.

(*i*) *Ibid.* § 113.

(*k*) See *Heilbut v. Nevill*, L. R. 5 C. P. 478.

(*l*) 46 & 47 Vict. c. 52, § 114. *Hawkins v. Ramsbottom*, 6 Taunt. 178.

(*m*) 46 & 47 Vict. c. 52, § 10 (2).

See *Ex parte Mills*, 6 Ch. 594.

SECTION II.—OF SET-OFF.

Closely connected with the subjects discussed in the preceding section, is the right of a defendant to set up, in opposition to the claim made against him, a counter claim, which the defendant might himself make the subject of a cross action against the plaintiff. The power of a defendant to do this is much more extensive than it was; for by Order XIX. rule 3, a defendant may set off or set up by way of counter-claim any right or claim, whether to a definite amount or not; but provision is made for disallowing a cross claim if it cannot be conveniently disposed of in the particular action in which it is set up. A short account, however, of the law as it stood before this alteration may still be useful.

1. **Set-off at law.**—The right of setting off one claim against another appears only to exist at common law, where a person seeks to avail himself of a lien on goods in his possession, but of which he is not the owner. But, by statute 2 Geo. 2, c. 22, where there were mutual debts between the plaintiff and the defendant, one debt might be set against the other (*n*). The statute, however, only applied to debts in the narrow sense of the word, *i.e.*, definite and ascertained sums of money, owing by each party to the other (*o*); and to debts owing to and by each party in the same capacity (*p*).

* 2. **Set-off in equity.**—Courts of equity, although [*291] governed in questions of set-off by principles similar to those which governed courts of law, went further than courts of law in applying those principles; admitting set-off in some cases where courts of law did not, and disallowing it in others where they did (*q*).

(*n*) 2 Geo. 2, c. 22; and see 8 Geo. 2, c. 24, as to setting off simple contract debts against specialty debts.

(*o*) See *Boddington v. Castelli*, 1 E. & B. 66 and 879; *Attwooll v. Attwooll*, 2 ib. 23; *Luckie v. Bushby*, 13 C. B. 864; and *Hutchinson v. Sydney*, 10 Ex. 438.

(*p*) See *Hutchinson v. Sturges*, Willes, 261; *Watts v. Rees*, 9 Ex. 696, and 11 ib. 410; *Mardall v.*

Thellusson, 6 E. & B. 976; *Pedder v. Mayor of Preston*, 12 C. B. N. S. 535.

(*q*) See, generally, as to set-off in equity, *Rawson v. Samuel*, Cr. & Ph. 161; *Clark v. Cort*, ib. 154; *Freeman v. Lomas*, 9 Ha. 109. See, also, *Hunt v. Jessel*, 18 Beav. 100, as to set-off between creditors and trustees of creditors' deeds. See, also, *Agra and Masterman's Bank v. Hoffman*, 5 N. R. 214, *sed qu.* this case.

Rules as to set-off.—The combined effect of the rules at law and in equity on the subject of set-off so far as it is necessary to allude to them in the present treatise are as follows:—

1. Joint debts owing to and by the same persons in the same right can be set off both at law and in equity.

2. Separate debts owing to and by the same person in the same right can also be set off both at law and in equity.

3. Debts not owing to and by the same persons in the same right cannot be set off either at law or in equity.¹ But before the Judicature acts and in considering whether debts were so owing, courts of law regarded the legal right, whilst courts of equity regarded the equitable right; and this led to the following amongst other important practical and different results (*r*).

Set-off by and against surviving partners.—For example, if a surviving partner was sued at law for a non-partnership debt, he could set off a partnership debt owing by the plaintiff to him and his late co-partners (*s*); and in an action by a surviving partner for a debt due to himself separately, the defendant could set off a debt due to himself from the plaintiff and his late partners (*t*).² In equity, however, this

(*r*) See *Fletcher v. Dyche*, 2 T. R. 493; *Golding v. Vaughan*, 2 Chitty, 32, and the cases in the next two notes. (t) *French v. Andrade*, 6 T. R.

(s) *Slipper v. Stidstone*, 5 T. R. 582.

¹ "The decisive objection to a set-off by the defendant, of a debt due to him from one of the firm, against a debt which he owes to the insolvent co-partners, is that it contravenes the rule of distribution of the property of insolvent debtors among their joint and several creditors." . . . "A debt due to a firm constitutes a part of their joint assets, and to allow a private debt due from one of the co-partners to be set off against it, would be to appropriate a part of the joint estate to pay a private debt. The effect of it would be not only to give a private creditor of one of the firm, who happened to be a debtor of the co-partnership, a preference over other creditors, but, in many cases, to absorb a large amount of the joint assets for the benefit of separate creditors." *Williams v. Brimhall*, 13 Gray, 462. See, also, *Sloan v. McDowell*, 71 N. C. 356; *Ward v. Newell*, 37 Tex. 261; *Collins v. Butler*, 14 Cal. 223; *Pegg v. Plank*, 3 Ont. C. P. 398; *Thomas v. Stetson*, 62 Iowa, 537; S. C. 49 Am. Rep. 148. The same reasoning applies to the set-off where the partnership is debtor. *Wilson v. Amiel*, 35 Wis. 526; *Houston v. Brown*, 23 Ark. 333; *Reed v. Whitney*, 7 Gray, 533; *Beauregard v. Case*, 1 Otto, 134, 23 L. ed. 263; *Whyteross v. Anderson*, 3 Australian J. R. 121 (Victoria).

² Debt due to or from surviving partners only may be set off. *Lord v. Baldwin*, 6 Pick. 352; *Lewis v. Culbertson*, 11 Serg. & R. 48; *Johnson v. Kaiser*, 40 N. J. L. 286; *Holbrook v. Lockety*, 13 Met. 132; *Marterson v. Goodlet*, 46 Tex. 402.

could not have been done. When a creditor of a firm seeks to obtain payment of his debt out of the estate of a deceased partner, that creditor cannot set off a debt due from himself to the deceased on a separate account: the creditor must pay this last debt in full, and then, as regards the debt in respect of which he sues, rank as any other creditor of the firm against the assets of the deceased (*u*). It is obvious that if in such *a case the two debts were set against [*292] each other, the separate creditors of the deceased would be paying a joint creditor of the firm, unless the assets of the deceased were sufficient to pay both classes of creditors in full.

On the other hand, debts which were really debts owing to and by a firm could be set off in equity although not at law. Thus in *Smith v. Parkes* (*x*), a firm of three partners covenanted to pay a certain sum of money to the defendant Parkes, who was indebted to the firm in certain other sums on another account. By the death of two of the members of the firm, the plaintiff Smith had become the sole surviving partner, and he was sued by Parkes on the covenant, and judgment was obtained. It was held that, notwithstanding the judgment and its effect at law, Smith was entitled in equity to set off against the judgment debt the amount of what was due from Parkes to the late firm; and it was also held that Smith had this right not only as against Parkes, but also against persons to whom he had assigned the debt due to him.

4. **Setting off joint debts against separate, and vice versâ.** — Except under special circumstances a debt due to or from several persons jointly cannot be set off against a debt due from or to one of such persons separately (*y*). This rule, which is really involved in the last, also prevailed before the Judicature acts both at law and in equity (*z*), and was of great importance to partners. It scarcely requires to be pointed out that to allow a set-off of such debts would be to enable a creditor to obtain payment of what is due to him from persons

(*u*) *Addis v. Knight*, 2 Mer. 117.

(*x*) 16 Bear. 115.

(*y*) See *Kinnerley v. Hossack*, 2 Taunt. 170; *Cheetham v. Crook*, McLel. & Y. 307; *Vulliamy v. Noble*, 3 Mer. 618. See, also, *Jebsen v. East*

and *West India Dock Co.*, L. R. 10 C. P. 300.

(*z*) It cannot be done in equity even in cases of fraud, see *Middleton v. Pollock*, 20 Eq. 515.

in no way indebted to him.¹ As a rule, therefore, a debt owing by one of the members of a firm cannot be set off at law against a debt owing to him and his co-partners (*a*): nor can a debt owing to one of the members of a firm be set off against a debt owing by him and his co-partners (*b*). And

this rule applies even where one partner only has [*293] been dealt with, and *the debts sought to be set against each other are a debt owing by him, and a debt owing to him and others, but arising out of transactions with him alone.

This last point is well illustrated by *Gordon v. Ellis* (*c*). There, an action was brought by three partners, for the recovery from the defendant of money received by him for goods of the plaintiffs sold by the defendant on their account. The defendant pleaded in effect, that he had been employed by A. only, that A. sent the goods for sale as if they were his own, and that the goods were sold by the defendant as A.'s goods, and that A. was indebted to the defendant in a larger amount than that sought to be recovered in the action. It was admitted, that if B. and C. had by their conduct induced the defendant to believe that A. was the sole owner of the goods in question, and to deal with A. on that supposition, the defendant would have had a good defence to the action; but it was held that, as the defendant did not allege that such had been the case, his plea was a mere attempt to set off a debt due from one member of the firm against a debt due to the firm itself, and was bad.

In strict analogy of the above rule it has been decided in equity that if the members of a firm have separate private accounts with the bankers of the firm, and a balance is due to the bankers from the firm on the partnership account, the bankers have no lien for such balance on what may be due from themselves to the members of the firm on their respective separate accounts; and that the debt due to the bankers from the partners jointly cannot be set off against the debts due from the bankers to the partners separately (*d*).

(*a*) *Gordon v. Ellis*, 2 C. B. 821; *France v. White*, 8 Scott, 257.

(*b*) *Arnold v. Bainbridge*, 9 Ex. 153; *McGillivray v. Simson*, 2 Car. & P. 329; *Boswell v. Smith*, 6 C. & P. 60.

(*c*) 2 C. B. 821; and see the same case, 7 Man. & Gr. 607, where it will be observed the plea was materially different.

(*d*) See *Watts v. Christie*, 11 Beav. 546; *Cavendish v. Geaves*, 24 ib. 173.

¹ See *ante*, p. 291, note 1.

Effect of Judicature acts.—The Judicature acts have extended the equitable principles of set-off to all actions in the High Court (*e*); and notwithstanding the rules relating to joint and to several claims (*f*), the old rule precluding the set-off of a joint against a separate debt, or *vice versâ*, is still in force (*g*).

* **Exceptions to general rule.**—To the general rule [*294] which precludes the set-off of a debt due to a firm against a debt owing by one of its members, and *vice versâ*, there are, however, a few exceptions.

Agreement.—If it can be shown that all parties concerned have expressly or impliedly agreed that a debt owing by one of them only shall be set off against a debt owing to them all or *vice versâ*, effect will be given to that agreement, and the application of the general doctrine in question will thereby be precluded. Regard, therefore, must be had to any agreement which the parties themselves may have come to, and to their course of dealing with each other (*h*).

So if a joint and several promissory note is made by partners, and one of them sues the payee for some separate demand, the defendant can set off the note; for, *ex hypothesi*, it is the several note of the partner suing him (*i*).

An agreement by one partner that a debt due from himself separately shall be set off against a debt due to him and his co-partners jointly is *primâ facie* a fraud on them; and a set-off founded on such an agreement cannot, it is apprehended, be maintained in the absence of special circumstances, rendering such an agreement binding on the other partners (*k*).

Another exception occurs where one partner has been allowed by his co-partners to act as if he were a principal and not an agent of the firm.

(*e*) See §§ 24 and 25 (6) (11) of the Judicature act, 1873.

(*f*) Ord. xvi. rr. 1, 4, 6, *ante*, p. 282.

(*g*) *Bowyear v. Pawson*, 6 Q. B. D. 540. However, in *Manchester, Sheffield & Linc. Rail. Co. v. Brooks*, 2 Ex. D. 243, a separate debt was allowed to be pleaded by way of set-off to an action for a joint debt. This can hardly have been right.

(*h*) See *Vulliamy v. Noble*, 3 Mer. 593; *Downam v. Matthews*, Prec. in

Ch. 580; *Cheetham v. Crook*, McLel. & Y. 307; *Kimmerley v. Hossack*, 2 Taunt. 170.

(*i*) See *Owen v. Wilkinson*, 5 C. B. N. S. 526.

(*k*) *Wallace v. Kelsall*, 7 M. & W. 264, is the other way, but is to be explained by the old technical rules of pleading, which are now abolished, see *ante*, p. 269; *Piercy v. Fynney*, 12 Eq. 69; *Nottidge v. Pritchard*, 2 Cl. & Fin. 379.

Set-off where there is a dormant partner.— It has been seen that dormant partners may join their co-partners in suing on contracts entered into in form with the latter only. But dormant partners cannot, by coming forward and suing on such contracts, deprive the defendant of any right of set-off of which he might have availed himself if the non-dormant partners only had been plaintiffs.¹ This was held by [*295] *Lord Kenyon in *Stracey v. Deey* (*l*), where the plaintiffs, Stracey, Ross, and others, were in partnership as grocers, and Ross was the only person who appeared to the public as concerned in the partnership business. The defendant had dealt with Ross, and had become indebted for grocery supplied by him. On the other hand, the defendant had expended money for Ross, and had done so on the supposition that the monies thus expended could be set off against what was due for the grocery. The plaintiffs, however, contended that this set-off could not be made; but Lord Kenyon held that as the defendant had a good defence by way of set-off against Ross, and had been by the conduct of the plaintiffs led to believe that Ross was the only person he contracted with, they could not pull off the mask and claim payment of debts supposed to be due to Ross alone, without allowing the defendant the same advantages and equities in his defence as he would have had in an action brought by Ross solely (*m*).

In this case, all the partners except Ross were dormant, and by the terms of the agreement into which all had entered, Ross alone was to be the apparent trader. His co-partners were therefore simply in the position of undisclosed principals, and were treated accordingly by the Court.

Cases where one partner only has been dealt with.— In *Gordon v. Ellis* (*n*), which has been before referred to, an attempt was made to extend the principle on which Lord Kenyon decided *Stracey v. Deey*, to all cases in which one

(*l*) 7 T. R. 361, note, and 2 Esp. 469. See, too, *Teed v. Elworthy*, 14 East, 213, and *De Mantort v. Saunders*, 1 B. & Ad. 398, overruling *Dubois v. Ludert*, 5 Taunt. 609.

(*m*) See *Cooke v. Eshelby*, 12 App. Ca. 271; *George v. Clagett*, 7 T. R. 359; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38.

(*n*) 2 C. B. 821, *ante*, p. 293.

¹ In an action by ostensible and dormant partners the defendant may set off a debt due from the ostensible partner only *Lord v. Baldwin*, 6 Pick. 352. See, also, *Chandler v. Drew*, 6 N. H. 469; *Bryant v. Clifford*, 27 Vt. 664; *Sloan v. McDowell*, 71 N. C. 356.

partner only transacts the business of the firm, and becomes himself indebted to the person with whom he deals. But it was held, and rightly, that a person liable to be sued by a firm cannot set off a debt due from one only of its members, on the ground that he only was dealt with by the defendant, unless it can be shown that the other members of the firm induced the defendant by their conduct to treat their co-partner as the only person with whom the defendant had to do (*o*).

* But here again it is to be observed, that if the debt [*296] due from one partner can be treated as due from the firm, that debt may be set off against another debt due to it. This is illustrated by the same case of *Gordon v. Ellis* (*p*), where in an action by a firm for money due to it from the defendant for goods of the firm sold by him, the latter was held entitled to set off a debt due to him for an advance made by him to one of the partners on account of those goods. The Court thought that although the money was advanced to one partner only, the defendant had a right to treat it as an advance to the firm made on that partner's requisition, whilst acting within the scope of his apparent authority as agent of the firm. In point of fact, the defendant, instead of waiting until he had sold the goods, and then handing over the money produced by their sale, made a payment on account; and he sought nothing more than to have the amount so prepaid deducted from the sum for which he sold the goods.

Attempt to avoid set-off by suing one partner. — It sometimes happens that in order to avoid a defence of set-off, a plaintiff who is indebted to a firm sues one of its members alone for a debt owing to the plaintiff by the firm. In such a case, the defendant may require his co-partners to be joined (*q*). Again, if a firm holds the note of a person to whom it is itself indebted, and in order to deprive him of his right of set-off, indorses the note to one of its members, and he alone sues on it, a defence disclosing the facts and setting off the debt owing to the defendant by the firm will be good (*r*).

Set-off where there has been an assignment. — The provision of the Judicature acts relating to the assignment of debts

(*o*) See *Ramazotti v. Bowring*, 7 C. B. N. S. 851; *Bonfield v. Smith*, 12 M. & W. 405; *ante*, p. 280; and *Baring v. Corrie*, 2 B. & A. 137.

(*p*) 7 Man. & Gr. 607.

(*q*) Ord. xvi. r. 11. See *Stackwood v. Dunn*, 3 Q. B. 823, and *Bonfield v. Smith*, 12 M. & W. 405.

(*r*) *Puller v. Roe*, 1 Peake, N. P. 260.

(*ante*, p. 285) has greatly facilitated defences by way of set-off where there has been a change in a firm. The principles applicable to such cases are well illustrated by the following decision.

In *Cavendish v. Geaves* (s), the plaintiff was indebted on bonds to a firm of bankers. Many changes in the [*297] firm took place, and the bonds in question were on each change assigned by the old to the new firm. The plaintiff had an account with the bank as one of its customers, and when the bank stopped payment a balance was owing to him on that account; but the bonds had been previously assigned to third parties, without notice however to the plaintiff. The question then arose, whether, notwithstanding the various changes in the firm, and the assignment of the bonds, the plaintiff was entitled to set-off against the debt due from him on the bonds, the amount due to him as a customer of the bank, and it was held that he was. The judgment in this case is peculiarly instructive, and the following extract from it is submitted to the reader without apology.

Effect of assignments and of changes in firm on right of set-off. —

“If a customer borrow money from his bankers and give a bond to secure it, and afterwards, on the balance of his general banking account a balance is due to the customer from the same bankers who are the obligees of the bond, a right to set off the balance against the money due on the bond will exist both at law and in equity (t).

“If the firm were altered and the bond assigned by the original obligees to the new firm, and notice of that assignment were given to the debtor, and if after this a balance were due to him from the new firm (the assignees of the bond), then no right of set-off would exist at law, because the assignment of the chose in action would be inoperative at law, and the obligees of the bond, and the debtors on the general account would be different persons; but as in equity the persons entitled to the bond, and the debtors on the general account, would be the same persons, a right to set-off would exist in this court, and the customer would in equity be entitled to set off the balance due to him against the bond debt due from him.

“If after the bond had been given it had been assigned to strangers, and no notice of that assignment had been given to the original debtor (the obligor of the bond), then his rights would remain the same. Thus, if the assignment had been made to the stranger before any alteration of

(s) 24 Beav. 163. See, also, *Jefferys v. Agra and Masterman's Bank*, 2 Eq. 674; and as to set-off at law as against the assignee of a debt after notice of the assignment, *Watson v.*

Mid-Wales Rail. Co., L. R. 2 C. P. 593.

(t) *Roxburghe v. Cox*, 17 Ch. D. 520.

the firm then the right of set-off would still remain at law, where the obligees of the bond and the debtors on the general account would be the same persons, and in equity also, if the matter on account were brought here, as the assignees of the chose in action would be bound by the equities affecting their assignors.

"But if notice of that assignment had been given to the original debtor, no right of set-off would exist in this court for the balance subsequently due by the bankers to the obligor; because the persons entitled to the bond would, as the obligor knew, be different persons from the debtors to him on the general account with whom he had continued to deal.

"If the assignment of the bond had been made to the new firm with *notice to the obligor they would, if debtors on the general [*298] account, be liable to the same rights of set-off in equity as if they had been the obligees.

"If, after the alteration of the firm and after the assignment of the bond to the new firm, with notice to the debtor or obligor of that assignment, an assignment had been made of the bond to strangers, and no notice of that second assignment given to the obligor, then the rights of set-off would still remain to him in equity as against the first assignees of whose assignment he had notice, and the second assignees would in equity be bound by it, because, as I have stated, the assignees of the bond take it subject to all the equities which affect the assignors."

The court, after laying down these general propositions, came to the conclusion on the evidence in the case, that the plaintiff was informed that the successive firms with which he dealt as customers, were his creditors in respect of the bonds, but that he had no notice of their assignment by the firm which stopped payment to the holders of them, and that therefore he was entitled, even as against such holders, to set off what was due to him as a customer of the bank when it stopped payment.

The above decisions are sufficient to show that in allowing debts to be set off against each other, courts of equity went far beyond courts of law, although they did not introduce any new principle of set-off. The truth of this was still more apparent from the cases in which set-off was not allowed, one of the debts being joint and the other several only.

[**Set-off in Bankruptcy.**¹]

¹ A joint indebtedness may be proved and set off against the estate of either of the joint debtors who may become bankrupt, and it makes no difference that it may be subject to be marshalled. *Gray v. Rollo*, 18 Wall. 629, 21 L. ed. 927; *Tucker v. Oxley*, 5 Cranch, 34, 3 L. ed. 39. Where, however, a bankrupt owes a debt to two persons jointly, and has a joint note of one of them and a third person, under the United States Bankrupt Act, the claims are neither mutual debts or credits. *Tucker v. Oxley*, *supra*. So, if three joint owners of a cargo employ a master to sell it, he cannot set off his share of the amount subsequently acquired by purchasing an interest of one of the joint owners, in an action by the three against him. *Young v. Black*, 7 Cranch, 565, 3 L. ed. 440. See *post*, 654 *et seq.*

SECTION III.—OF EXECUTION AGAINST PARTNERS FOR THE DEBTS OF THE FIRM.

Execution against partners.—If a judgment has been obtained against several persons sued jointly, the writ of execution founded on the judgment must be against all of them, and not against some or one of them only; for the judgment does not warrant such a writ (*u*). But, although the writ of execution on a joint judgment must be joint in form, it may be *levied* upon all or any one or more of the persons named in it; for each is liable to the judgment creditor for the whole, and not for a proportionate part [*299] of the *sum for which judgment is obtained (*x*). The consequence of this is that the sheriff may execute a writ issued against several partners jointly, either on their joint property, *or* on the separate property of any one or more of them, *or* both on their joint and on their respective separate properties; and so long as there is, within the sheriff's bailiwick, any property of the partners, or any of them, a return of *nulla bona* is improper (*y*). Of course, if the judgment creditor has had execution and satisfaction against one of the partners, he cannot afterwards go against any of the others (*z*); but the important point to observe is, that the sheriff is not bound to levy on the goods of the firm before having recourse to the separate properties of its members, and that they cannot require the sheriff to execute the writ in one way rather than another.¹

Similar rules are applicable to attachments of debts under the Common law procedure act, 1854 (17 & 18 Vict. c. 125, § 61), it having been determined that a judgment creditor of three persons can, under the act in question, attach debts owing to any one or more of his judgment debtors (*a*).

(*u*) See *Penoyer v. Brace*, 1 Lord Raymond, 244; *Clarke v. Clement*, 6 T. R. 526; 2 Wms. Saund. 721; Bac. Ab. Exec. G. 1.

(*x*) See *per* De Grey, C. J., in *Abbot v. Smith*, 2 Wm. Blacks. 949;

and *Herries v. Jamieson*, 5 T. R. 556, *per* Lord Kenyon.

(*y*) See *Jones v. Clayton*, 4 M. & S. 349.

(*z*) See Com. Dig. Execution, H.

(*a*) *Miller v. Mynn*, 1 E. & E. 1075.

¹ In partnerships, the members undertake joint enterprises, assume joint risks, and incur, in all cases, joint liabilities. They must be sued jointly, and judgment and execution rendered accordingly. *Mason v. Eldred*, 6 Wall. 231, 18 L. ed. 783; *Adkins v. Arthur*, 33 Tex. 431; *Fitzgerald v. Grimmell*, 64 Iowa, 261; *Storm v. Roberts*, 54 Iowa, 677.

The extent to which the right to levy execution against the effects of a firm is affected by bankruptcy will be examined hereafter.

The procedure on a judgment against a firm (*b*) is regulated by Order XLII., Rule 10, which is as follows:—

Execution against partners on judgment against firm.—Where a judgment or order is against a firm, execution may issue:—

(*a.*) Against any property of the partnership;

(*b.*) Against any person who has appeared in his own name under Order XII., Rule 15, or who has admitted on the pleadings that he is, or has been adjudged to be, a partner;

(*c.*) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do; and the Court or Judge may give such leave if the liability be not disputed, or, if such liability *be disputed, may order that the [*300] liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

It is not clearly said in this rule that execution must first be levied against the joint estate of the firm before having recourse to the separate estates of the members; and, having regard to the previous well-established practice, the rule cannot be construed as rendering such a course necessary.

The proper mode of entering up judgment has been already considered, *ante*, p. 266.

Execution on judgment against firm.—If judgment is entered up against a firm in its mercantile name, execution can only issue without leave against the property of the firm (*c*), or against those persons specially mentioned in Order XLII., Rule 10, other persons sought to be made liable must be proceeded against in some other way and some judgment or

(*b*) The firm here means the partners when the cause of action accrued, *ante*, p. 265.

(*c*) If there is a receiver, application must be made to the court, *Kewney v. Attrill*, 34 Ch. D. 345.

In Mississippi, by statute co-partners' liabilities are joint and several, and a creditor may declare against one or more of them; so the creditor may take judgment against one by default and discontinue against the others. *Annis v. Smith*, 16 Pet. 303, 10 L. ed. 973.

And in Massachusetts, by statute an action against joint contractors may proceed against those served with process without further proceedings against the others. Pub. St. chap. 164, sec. 14, 15; *Shirley v. Shattuck*, 13 Met. 260; *Odom v. Denny*, 16 Gray, 114; *Knapp v. Abell*, 10 Allen, 490.

order must be obtained against them establishing their liability before execution can issue against them (*d*). An action founded on the judgment may be brought against them, and it is not necessary to proceed by an issue and an order under the rule (*e*). But the judgment cannot be made the foundation of a debtor's summons in bankruptcy against them if they dispute their liability; for in the case supposed their liability in respect of the judgment has not yet been established (*f*).

The mode of taking in execution the share of one partner on a separate judgment against him will be examined hereafter (see Bk. III. c. 5, § 4).

(*d*) *Davis v. Morris*, 10 Q. B. D. 124; *Ex parte Blain*, 12 Ch. D. 522, 436. where the alleged debtor was a foreigner residing abroad.

(*e*) *Clark v. Cullen*, 9 Q. B. D. 355.

(*f*) *Ex parte Young*, 19 Ch. D.

As to whether execution can be levied on the separate property of one or more of the judgment debtors, or should be levied on the joint property, the decisions are not uniform. *Watts v. Rice*, 75 Ala. 289; *Levally v. Ellis*, 13 Iowa, 544; *York Bank's Appeal*, 36 Penn. St. 458. The better rule seems to be that of the text, that although the execution is joint in form, it may be levied upon all or any one or more of the persons named in it. *Story*, Part. § 260; *Stevens v. Perry*, 113 Mass. 380; *Carmel v. Asselin*, 28 Low. Can. Jur. 28. Creditor not obliged to exhaust firm assets before levying on the effects of member, *Carmel v. Asselin*, *supra*; and against estate of deceased partner, *Doggett v. Dill*, 108 Ill. 560; s. c. 48 Am. Rep. 565. Otherwise held in *Bowker v. Smith*, 48 N. H. 111; *Tassey v. Church*, 6 W. & S. 465; *Watts v. Rice*, *supra*. And see *Bates*, Part. § 1064. And see *Ruth v. Lowrey*, 10 Neb. 260.

OF THE RIGHTS AND OBLIGATIONS OF MEM-
BERS OF PARTNERSHIPS BETWEEN
THEMSELVES.

CHAPTER I.

OF THE RIGHT TO TAKE PART IN THE MANAGEMENT OF
THE AFFAIRS OF THE FIRM.

Each member of partnership entitled to take part in its management. — In partnerships, the good faith of the partners is pledged mutually to each other that the business shall be conducted with their actual personal interposition, so that each may see that the other is carrying it on for their mutual advantage (*a*).

In the absence of an express agreement to the contrary, the powers of the members of a partnership are equal, even although their shares may be unequal; and there is no right on the part of one or more to exclude another from an equal management in the concern (*b*). Moreover, if two persons are in partnership, and one of them mortgages all his share and interest therein to the other, the latter will not be permitted, during the continuance of the partnership, to avail himself of his rights as a mortgagee and to exclude his co-partner from interference in the partnership (*c*). Indeed, speaking generally, it may be said that nothing is considered as so loudly calling for the interference of the Court between partners, as the improper exclusion of one of them by the

(*a*) *Per* Lord Eldon in *Peacock* 558; see, too, *Lloyd v. Loaring*, 6 *v. Peacock*, 16 Ves. 51. Ves. 777.

(*b*) *Rowe v. Wood*, 2 Jac. & W. 558. (*c*) *Rowe v. Wood*, 2 Jac. & W. 558.

others from taking part in the management of the partnership business (*d*).¹

[*302] * **Unless otherwise agreed.**—It need, however, hardly be observed that it is perfectly competent for partners to agree that the management of the partnership affairs shall be confided to one or more of their number exclusively of the others; and that where such an agreement is entered into, it is not competent for those who have agreed to take no part in the management, to transact the partnership business without the consent of all the other partners.¹ But, as was seen in an earlier part of the treatise, every member of an ordinary firm is *primâ facie* its agent for carrying on its business in the usual way (*e*); and persons dealing with a partner within the limits of his apparent authority, are entitled to hold the firm answerable for his conduct, unless such persons had distinct notice that his real authority was less extensive than they had a right to assume it to be.

(*d*) See, in addition to the cases Jac. & W. 589; *Marshall v. Colman*, last cited, *Goodman v. Whitcomb*, 1 2 ib. 266.

(*e*) *Ante*, book ii. ch. 1.

¹ Four partners got an injunction and receiver against the fifth for "dictatorial conduct." *Barrett v. Snowball*, 1 Australian J. R. 8 (Victoria).

When plaintiff by "dictatorial conduct" had begun the strife, dissolution was refused. *Mitchell v. Welsh*, 4 Australian J. R. 183 (Victoria).

Injunction refused to restrain partner from carrying off property and putting it aboard ship, where it was not shown that the defendant himself was about to leave the colony, or was insolvent, while the nature of the property was not such that its removal would cause irreparable damage, but was capable of remuneration by equitable damages. *Hickey v. Moore*, *Argus Reports*, June 23, 1859 (Victoria); *Kerford & Box*, Dig. 336.

On dissolution and a bill for exclusion attempted to be justified by parol agreement.

Held, plaintiff entitled to a receiver for his security until the hearing. *Steele v. Grossmith*, 19 Ont. Chy. 141.

Story, Part. § 181; Coll. Part. B. 2, ch. 2, § 1. *Pearce v. Ham*, 113 U. S. 585, 28 L. ed. 1067; *Ambler v. Whipple*, 20 Wall. 546, 22 L. ed. 403; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955.

¹ See *Uplam v. Hewitt*, 42 Wis. 85; *Anthony v. Wheatons*, 7 R. I. 49; *McFerran v. Filbert*, 102 Penn. St. 73; *Winship v. Bank of United States*, 5 Pet. 529, 8 L. ed. 216.

*CHAPTER II.

[*303]

OF THE GENERAL DUTY OF PARTNERS TO OBSERVE GOOD FAITH.

SECTION I. — PRELIMINARY REMARKS.

High standard of honour requisite among partners. — *In societatibus contractibus fides exuberet (a)*. The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has law on his side, but that his conduct will bear to be tried by the highest standard of honour (*b*). Thus, if one partner knows more about the state of the partnership accounts than another, and concealing what he knows, enters into an agreement with that other, relative to some matter as to which a knowledge of the state of the accounts is material, such agreement will not be allowed to stand (*c*).

High standard of honour requisite among those about to become partners, and among those who have ceased to be partners. —

This obligation to perfect fairness and good faith, is, moreover, not confined to persons who actually are partners. It extends to persons negotiating for a partnership, but between whom no partnership as yet exists (*d*);¹ and also to persons

(a) Cod. iv. tit. 37, l. 3.

(b) See *Blisset v. Daniel*, 10 Ha. 522, 536. Compare *Cassels v. Stewart*, 6 App. Ca. 64, noticed *infra*, which shows how difficult it is to apply this general principle.

(c) See *Maddeford v. Austwick*, 1 Sim. 89.

(d) See *Hichens v. Congreve*, 1 R. & M. 150; *Fawcett v. Whitehouse*, ib. 132.

¹ One induced to become partner by misrepresentation as to previous losses is entitled to be relieved from his agreement and indemnified against liabilities incurred prior to his discovery of the untruth of the misrepresentation. *Merchants' Bank v. Thompson*, 3 Ont. R. Ch. D. 541; *Mallon v. Craig*, 3 Ont. R. Ch. D. 541.

who have dissolved partnership but who have not completely wound up and settled the partnership affairs (*e*);² and most especially is good faith required to be observed when [*304] one *partner is endeavouring to get rid of another, or to buy him out (*f*).¹

Each must do his duty.—Notwithstanding the universal application to partners of the rule requiring perfect good faith, if one partner repudiates the contract of partnership and will not perform his duty towards his co-partners, he cannot justly complain if they in return decline to treat him on a footing of equality with themselves (*g*). As observed by Lord Eldon in *Const v. Harris*: “A partner who complains that the other partners do not do their duty towards him, must be ready at all times and offer himself to do his duty towards them” (*h*). But if a partner has been set at defiance by his co-partners; if they have denied that he is a partner, and that he has any right to interfere in the partnership, they can derive no advantage from the circumstance that he has not performed his duty to them (*i*).

A partner whose rights are denied should be prompt in asserting them, or he may be seriously prejudiced. This

(*e*) See *Lees v. Laforest*, 14 Beav. 250; *Clegg v. Fishwick*, 1 Mac. & G. 294; *Perons v. Johnson*, 3 Sm. & G. 419; *Clements v. Hall*, 2 De G. & J. 173.

(*f*) *Blisset v. Daniel*, 10 Ha. 493; *Maddeford v. Anstwick*, 1 Sim. 89; *Perens v. Johnson*, 3 Sm. & G. 419; *Chandler v. Dorsett*, Finch, 431. As

to withholding information, see *McLure v. Ripley*, 2 Mac. & G. 274.

(*g*) See *McLure v. Ripley*, 2 Mac. & G. 274; *Reilly v. Walsh*, 11 Ir. Eq. 22.

(*h*) *Turn. & R.* 524.

(*i*) See *Dale v. Hamilton*, 2 Ph. 276.

Having become a partner on the faith that the firm intended to form a syndicate with another firm, which was not done for want of concurrence of some members of such other firm, M. was, on this account, also entitled to be relieved from his agreement to become a partner. *Mallon v. Craig*, 3 Ont. R. Ch. D. 541; *Dunlop and Richards*, 2 E. D. Smith, 181; *Simmons v. Vulean Oil & M. Co.*, 61 Penn. St. 202; *Densmore Oil Co. v. Densmore*, 64 id. 43; *Emery v. Parrott*, 107 Mass. 95.

Allowances will be made to an incoming partner in respect to misrepresentations made to him by his co-partners as to the liabilities at the time he joined. *Davidson v. Thirkell*, 3 Ont. Ch. 330.

² Surviving partner in dealing with executor of deceased partner is bound to give full information and conceal nothing purposely or carelessly. *Clark v. Clark*, 8 Victorian L. R. Eq. 303; *Heward v. Slagle*, 52 Ill. 336; *White v. Gardner*, 37 Tex. 407; *Heath v. Waters*, 40 Mich. 457.

¹ In *Pearce v. Ham*, 113 U. S. 585, 28 L. ed. 1067, P. undertook, without good cause, to exclude H., his partner, from a share in a valuable contract belonging to the firm, and to take in K. in his stead, K. knowing and conspiring with P. to that end. It was held that these acts did not affect the rights

subject will be further adverted to in that part of the work which relates to the defences to actions between partners (*k*).

(*k*) *Infra*, ch. 10, § 3.

of H., and that he was entitled to one-half of the profits of the contract. See also *Chapin v. Streeter*, 124 U. S. 460, 31 L. ed. 475.

Defendants induced plaintiff to consent to a dissolution before end of term. Defendants thereupon made a valuation of the assets, and a settlement was had founded on such valuation, under the erroneous impression on plaintiff's part that one of the defendants was to retire, and that the other's interest in the valuation was identical with plaintiff's. The fact was, defendants had privately agreed that, after settling with plaintiff, the stock should be sold for their joint benefit, that they should share equally in the proceeds, and carry on the business. Held, transaction not binding on plaintiff. *O'Connor v. Naughton*, 13 Ont. Ch. 428.

One of two brothers, partners, persuaded the other, who was ill and mentally enfeebled, to sell out to him, and made out a false balance sheet, which represented the interest as worth much less than it really was, and so the retiring brother was induced to accept for his share much less than its value. Held, that the sale should be set aside. *Platt v. Platt*, 2 Th. & C. 30 (N. Y.).

R. acted as U.'s agent or partner in the fur business, and was to have one-half the net profits of each year's transactions, and assume one-third the losses, not to exceed £3000. S., acting for U., procured a settlement with R. on false representations, and R. successfully impugned its *bonâ fides*, and was allowed a decree for an account and costs to the hearing. *Rogers v. Ullmann*, 27 Ont. Ch. 137.

Fraudulent representation by one partner at commencement of partnership, uncorrected and influencing the other in a bargain at close of partnership, has same effect to vitiate bargain as if then repeated. *Longstaff v. Keogh*, 3 Victorian L. R. Eq. 175.

Partner entrusted with control of business by co-partner, who is ignorant and inexperienced, is held to strict account for faithfulness as partner and accountant, and a settlement based upon a few meagre items furnished by experienced to inexperienced partner a few days after dissolution, will not bar suit for accounting the equity rule as to correction of mistakes applying to partnership settlements. *Martin v. Smith*, 11 Cent. Rep. 748, N. J. 1888.

In *Sexton v. Sexton*, 9 Grat. 204, the selling partner attempted to make out for his own guidance a list of debts due from the firm, and estimated them at only half what they were, but it did not appear to have been relied on by his partner in purchasing, and he offered to sell or buy at a specific price, and the partner bought at that price. Held, that if he had perceived that his partner was laboring under incorrect views in reference to the amount of the firm's indebtedness, by which he might have been misled to make too high an offer for the interest to be sold, it was his duty to furnish all the data he might have, whereby said views might be corrected before the bargain was concluded, and in this case he does not appear to have violated his duty. See also *Pomeroy v. Benton*, 57 Mo. 531; s. c. 77 Mo. 64; *Hopkins v. Watt*, 13 Ill. 298; *Kintrea v. Charles*, 12 Ont. Chy. 117; *O'Connor v. Naughton*, 13 Ont. Chy. 428; *Heath v. Waters*, 40 Mich. 457; *Longstaff v. Keogh*, 3 Victorian L. R. Eq. 175; *Baldey v. Brackenridge*, 39 La. Ann. 660.

The bill alleged that the partnership, at the time of its dissolution in 1861, owned a share in the whaling barque "Ocean Rover," then at sea, and in her outfits and catchings, and that, in 1862, upon the voyage the vessel and her cargo were destroyed by the insurgent cruiser "Alabama," and this share was

Principle of good faith the basis of the internal law of partnership.—The foregoing general principles may be regarded as the basis of the law of partnership, so far as it relates to the rights and obligations of partners as between themselves, and they will be found to be more or less illustrated throughout the whole of the present book. Those cases, however, which more especially relate to the obligation of partners not to benefit themselves at the expense of their co-partners, and to the rights of majorities, require to be specially noticed.

not insured; and that, pursuant to a decision of the Court of Commissioners of Alabama claims, the sum of \$1564 had been paid to D., in respect of his and the plaintiff's share in the vessel and outfits, and the sum of \$55,068 to the other two defendants, in respect of her total earnings and catchings, to be by them distributed among her owners; and prayed for an injunction, an account, and further relief. After the former decision, 125 Mass. 469, the defendant D. answered that the partnership was dissolved in 1861; that in 1865, after the plaintiff's insolvency, D., in order to close up all outstanding accounts of the firm, as the solvent partner, advertised for sale by auction all the remaining assets of the firm, consisting of the interest of the firm in the barque "Ocean Rover," and all other notes and accounts; that the plaintiff and his assignee were present at said sale, and the plaintiff made a bid for said interest in the "Ocean Rover," and that the same was struck off to one LeB. as the highest bidder; "that subsequently, at the request of said defendant, who had previously requested said LeB. to bid on said interest at said sale, the said LeB. agreed to transfer said interest to the said defendant, at the price at which it had been knocked off to him," and that transfers of said interest were made by the firm to LeB., and by him to the defendant. LeB. bid \$12 for the interest, and sold it to D. at same price, which was paid by D. The conveyance to LeB. was dated July 20, 1865, signed by D. in firm name, but was written about Sept. 11, 1865, at the same time as the transfer from LeB. to D. Neither the plaintiff nor his assignee in insolvency knew of the arrangement between D. and LeB. Held, that the rule that a trustee will not be permitted to make a profit out of the trust property, and that if he purchases it, even at public auction, he will hold it for the benefit of the *cestui que trust*, applies, and there must be a decree against the defendants. *Jones v. Dexter*, 130 Mass. 383; s. c. 39 Am. Rep. 459; *Perry on Trusts*, § 427; *Story Eq. Jur.* § 323; *Wyman v. Hooper*, 2 Gray, 141.

*SECTION II.—OF THE OBLIGATION OF PARTNERS [*305]
NOT TO BENEFIT THEMSELVES AT THE EXPENSE
OF THEIR CO-PARTNERS.

No partner allowed to benefit himself at the expense of the firm.—Good faith requires that a partner shall not obtain a private advantage at the expense of the firm. He is bound in all transactions affecting the partnership, to do his best for the common body, and to share with his co-partners any benefit which he may have been able to obtain from other people, and in which the firm is in honour and conscience entitled to participate; *Semper enim non id quod privatim interest unius ex sociis servari solet, sed quod societati expedit (l)*.

There are two modes in which, more especially, partners attempt unfairly to acquire gain at the expense of their co-partners, viz., 1, by directly making a profit out of them; and 2, by appropriating to themselves benefits which they ought to have acquired, if at all, for the common advantage of the firm. It will be convenient to advert to each of these modes in turn.

1. **Deriving profit from dealings with the firm.**—In the first place, then, it may be laid down as a general rule, that one partner is not allowed to derive profit at the expense of the firm from any dealings between him and the partnership, unless it is clearly agreed that he is to have such profit.¹

Sale to firm.—For example, if a partner is buying or selling for a firm, he cannot sell to it or buy from it at a profit to himself.

In *Bentley v. Craven (m)*, one of the several partners was employed to purchase goods for the firm. He, unknown to

(l) Dig. xvii. tit. 2, *pro socio*, l. 65, § 5.

(m) 18 Beav. 75.

¹ C., the defendant's intestate, and plaintiff's assignors were partners in the stove business at Troy. C. purchased for the firm from B. the right to use a patented improvement on payment of one dollar on each stove manufactured by them, and the firm were authorized to sell the right to use this improvement to other stove manufacturers at Troy. Under this agreement the firm paid B. \$11,000. C. had a secret agreement with B. to use his influence to bring the improvement into general use at Troy and elsewhere, in consideration of which service he was to have one-half the moneys paid to B. It did not appear that he rendered any services, but B. paid him half the \$11,000. After the dissolution the partners learned of the secret agreement, and brought an action against C. for an account.

his co-partners, supplied them, at the market price, with goods previously bought by himself when the price was lower, and he so made a considerable profit. But it was held that the transaction could not be sustained, and that he was accountable to the firm for the profit thus made. The Master of the

Held, that C., by entering into this agreement with B., engaged in a business which necessarily conflicted with the interests which he held in common with his associates, and which, if the agreement had been fulfilled, might have seriously affected their profits, that such business thereby became part of the business of the firm, and that he was liable to account to his co-partners for their proportionate share of the profits he realized. *Manuf. Nat. Bk of Troy v. Cox*, 2 Hun, 572; affirmed 59 N. Y. 659.

Every partner is under obligation to exercise due diligence and skill, and devote his services for promotion of common benefit of the concern without compensation unless stipulated for. *Denver v. Roane*, 99 U. S. 355, 25 L. ed. 476.

In a partnership where each had a right to convey and sell his rights therein whenever he chose.

Held, that transferee of one could not act in such a manner as to injure the business, and that if he did, the others had a personal and direct action against him for damage for breach and rescission for the future. *Lalouette v. Delisle*, 8 Low. Can. R. 174 Q. B.

On a joint purchase of debentures one partner succeeded in inducing the bank to pay out to him more than his share of the margin which belonged to him jointly with the plaintiff, and the Court of Chancery and the Ontario Court of Appeal and the Supreme Court of Canada held that the payment by the bank was not authorized, and that the defendant should reimburse the plaintiff for the excess drawn out. *Walker v. Cornell*, Canada S. C., Feb. 12, 1881, Cassell's Dig. p. 328. See also *Stoughton v. Lynch*, 1 Johns. Chy. 467; *Kent, Chanc.*; *Marsh's Appeal*, 69 Penn. St. 30; *Looney v. Gillenwaters*, 11 Heisk. 133; *McAdams v. Hawes*, 9 Bush, 15 (Ky.).

It is the duty of a partner, in possession of partnership property, and in use of it at the time, to pay the taxes thereon, which are a joint liability upon the property of the firm. Where one partner rented of his co-partner his undivided half of the partnership property, and paid his own half of the taxes thereon, and suffered the undivided half of the property of his co-partner to be sold for the taxes, and afterwards rented the half so sold from the purchaser at the tax sale, he cannot be allowed the amount he has paid to such purchaser for rent, in an action by the co-partner on the original lease to recover the rent due thereon. And the co-partner's statements that he would not allow the amount to him which he might pay as taxes did not discharge him from the obligation to pay them. *Chapin v. Streeter*, 124 U. S. 360, 31 L. ed. 475.

K., M. & W. and A. P. M. associated themselves as M., W. & Co. to tender, contract for and execute extensive public works advertised by the Quebec Harbor Commissioners, each to do his best to secure the contract for the whole work or any portion or sub-contract, and they made tenders in firm name. M. & W. found that their tender was not likely to be accepted, but that S. P.'s tender would be, and they privately made a sub-contract with S. P. at such low rate that it enabled him to lower his tender for the whole work, and he secured it, M. & W. withdrawing the tenders of M., W. & Co., and the contract was issued to the new firm of P., M. & W., M. & W. to have the performance of and the profits resulting from the larger portion of said work, and particularly the dredging.

Rolls in delivering judgment, observed: "The case is this, — Four partners established a partnership for refining sugar; one of them is a wholesale grocer, and from his business is peculiarly cognizant with the variations in the sugar-market, and has great skill in buying sugar at the right and proper

The principal contention was whether the partnership obligation of M. & W. was limited to the tenders put in by them in conjunction with K. and A. P. M. The Superior Court so held. The Court of Queen's Bench (1 Quebec App. 297) held that the agreement was that they should be jointly interested not only in the profits of the entire work, but in any portion of it that they could secure, and that the defendants had, in fraud of the plaintiff, procured the contract for the execution of a large proportion of the works in conjunction with P. On appeal this judgment was affirmed. *Wright v. Kane*, Canada S. C., April 28, 1882; Cassell's Dig. p. 329, and mentioned in *Berger v. Metivier*, 1 Quebec App. 327.

Partners in supplying iron to a railway made no division of the profits, and one of them went on investing receipts in other contracts, and the other claimed a like interest therein also.

Held, the onus of negating such interest was on the defendant, and the court directed a reference to take the accounts. *Cameron v. Bickford*, 11 Ont. App. 52. *Reversed by Privy Council — not reported.*

A conspiracy between a partner and a third person, whereby they undertook to exclude the other partner from an interest in a valuable contract in which the partnership was concerned, and succeeded in obtaining and appropriating all the profits of the contract, cannot affect the rights of such partner, and he is entitled to recover his share of the profits of such contract from the others. *Pearce v. Ham*, 113 U. S. 585, 28 L. ed. 1067.

A Court of Equity may interfere by injunction to restrain one partner from violating the rights of his co-partner, even when a dissolution of the co-partnership is not contemplated. *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 555; *Ambler v. Whipple*, 20 Wall. 546, 22 L. ed. 403.

C., in partnership with the plaintiff in mining, bought the privilege of digging for gold on Elzevir lot in his own name, and formed a company by whom that lot was purchased. The plaintiff was entitled to a share of all the profits and advantages made by C. in this transaction. *Burn v. Strong*, 14 Ont. Ch. 651.

Where the partnership hired property, and one partner purchased it during the partnership, all were interested in the purchase on payment of their shares of the purchase money. *Laffan v. Naglee*, 9 Cal. 662; *Anderson v. Lemon*, 8 N. Y. 236. See also *Forrer v. Forrer*, 29 Gratt. 134. See also the numerous cases of purchases by one partner of outstanding titles or rights, patent and other, in which the firm is interested. *American Bank Note Co. v. Edson*, 56 Barb. 84; 1 Lans. 388; *Kinsman v. Parkhurst*, 18 How. 289, 15 L. ed. 385; *Washburn v. Washburn*, 23 Vt. 576; *Weston v. Ketcham*, 39 Jones & S. (N. Y.) 54; *Gillett v. Gaffney*, 3 Colo. 351; *Eakin v. Shumaker*, 12 Tex. 51; *Forrer v. Forrer*, 29 Gratt. 134; *Warren v. Schainwald*, 62 Cal. 56. But see *Wheeler v. Sage*, 1 Wall. 518; *Bissell v. Foss*, 114 U. S. 252, 29 L. ed. 126.

Partnership funds in the hands of a partner are in trust. Property bought by a partner with such funds is taken in trust for the firm. *Shaler v. Prowbridge*, 28 N. J. Eq. 595; *Reis v. Hellman*, 25 Ohio St. 180; *Evans v. Gibson*, 29 Mo. 223; *Love v. Carpenter*, 30 Ind. 284; *Lefever v. Underwood*, 41 Penn. St. 505; *Wheatley v. Calhoun*, 12 Leigh, 264; *Smith v. Ramsey*, 1 Gilm. 373; *Re Clap*, 2 Lowell, 168; *Raiguel's Appeal*, 20 Penn. St. 234; *Kelley v. Greenleaf*, 3 Story, 93; *Coder v. Huling*, 27 Penn. St. 84; *Klotz v. Macready*,

time for the business. Accordingly the business of [*306] selecting and *purchasing the sugar for the sugar refinery is entrusted to him. He being the person to buy, it is his duty and business to employ his skill in buying for the sugar refinery at the time he thinks most beneficial. Having according to his skill and knowledge bought sugar at a time when he thought it likely to rise, and it having risen, and the firm being in want of some, he sells his own sugars to the firm without letting the partners know that it was his sugar that was sold." Being the agent for the firm for buying sugars, he sold his own sugars to the firm and made a profit, and the firm was held entitled to that profit accordingly.

29 La. Ann. 638; Croughton v. Forrest, 17 Mo. 131; Catron v. Shepherd, 8 Neb. 308; McKenzie v. Dickinson, 43 Cal. 119; Farmer v. Samuel, 4 Litt. 187; Baird v. Baird, 1 Dev. & Bat. Eq. 524; Phillips v. Crammond, 2 Wash. C. C. 441; Swift v. Dean, 6 Johns. 523; Brown v. O'Brien, 4 Neb. 195; Partridge v. Wells, 30 N. J. Eq. 176; Coddington v. Idell, id. 540. But see Whitsides v. Lafferty, 3 Humph. 150.

The plaintiffs, sisters, started a little business, helped their brothers and sisters, the defendants, to immigrate, and took them into partnership. All lived together and used proceeds indiscriminately; but the elder brother assumed management and conducted outdoor business as if solely interested. Molesworth, J., held that the acquiescence of the others in one acting as sole owner for a considerable time would deprive them of any rights as partners. Marriage of one sister dissolved the partnership. Elder brother had offered at that time to give each sister a certain sum for her interest. Court made a decree as to rights of each up to such dissolution. On appeal, held, that partnership still subsisted as to the unmarried ones, and allowed appeal of the sister who remained after the others had been bought out; also that the buildings were part of the partnership assets; but as to other land bought by elder brother with partnership funds, he should be charged the amount expended and eight per cent. interest. Johnson v. Colclough, 4 Australian J. R. 53, 131 (Victoria).

If process be served on one partner in an action against the firm, and judgment recovered and execution levied against firm property, it is the duty of such partner to give notice of it to his co-partners, and neglect to do so subjects him to an action. Devall v. Burlbridge, 6 Watts & S. 523.

One of the members of a limited partnership, appointed manager of the business and so acting, furnished from his shop goods for the partnership, upon which he charged the usual trade profits. Held, that *prima facie* such transactions could not be sustained. Patterson v. Holland, 7 Ont. Chy. 1. See also McMahon v. McClernan, 10 W. Va. 419; Lockwood v. Beckwith, 6 Mich. 168; Fanning v. Chadwick, 3 Pick. 420; Dunlop v. Richards, 2 E. D. Smith, 181; Bast's Appeal, 70 Penn. St. 301; Chandler v. Sherman, 16 Fla. 99.

It is in accordance with this rule of good faith that one partner in an illegal enterprise completed cannot refuse to account to the other for profits on the ground of the illegality. Pfeuffer v. Maltby, 54 Tex. 454; s. c. 38 Am. Rep. 631; De Leon v. Trevino, 49 Tex. 89; s. c. 30 Am. Rep. 101; Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732; Anderson v. Whitlock, 2 Bush, 398.

Purchase from firm. — In *Dunne v. English* (*n*), the plaintiff and the defendant had agreed to buy a mine for 50,000*l.*, with a view to re-sell it at a profit. It was ultimately arranged that the defendant should sell it to certain persons for 60,000*l.*, and that the profit of 10,000*l.* should be equally divided between the plaintiff and the defendant. The defendant, however, in fact sold the mine for much more than 60,000*l.* to a company in which he himself had a large interest. The plaintiff was held entitled to one-half of the whole profit made by the resale.

Full disclosure necessary. — There was in this case some evidence that the plaintiff knew that the defendant had some interest in the purchase beyond his share of the known profit of 10,000*l.*; but the plaintiff did not know what that interest was, and the real truth was concealed from him. It was held that the defendant being the plaintiff's partner, and expressly entrusted with the conduct of the sale, was bound fully to disclose the real facts to the plaintiff, and not having done so, could not exclude him from his share of the profits which the defendant realised by the sale (*o*).

Authority to sell at a given price no waiver of share of higher price. — This case also shows, what indeed is obvious enough without authority, that one partner who authorises another to sell partnership property at a given price, does not thereby deprive himself of his right to share a higher price if a higher price should be realised (*p*).

*** 2. Obtaining benefits which in honour belong to the** [*307]
firm. — The same principles apply to attempts made by partners to secure for themselves benefits which it was their duty to obtain, if at all, for the firm to which they belong (*q*).

Thus in *Carter v. Horne* (*r*), the plaintiff and the defendant agreed for the purchase of an estate in moieties between

(*n*) 18 Eq. 524.

(*o*) See, also, *Imp. Mere. Credit Assoc. v. Coleman*, L. R. 6 H. L. 189.

(*p*) See, also, *Parker v. McKenna*, 10 Ch. 96, and *De Bussche v. Alt*, 8 Ch. D. 286; and see *ib.* p. 317, as to a custom authorising such a practice.

(*q*) *Parker v. Hills*, 5 Jur. N. S. 809, is not opposed to these cases, for there the money was paid for a

lease which was held to belong to one partner only.

(*r*) 1 Eq. Ab. 7. See, also, *De Bussche v. Alt*, 8 Ch. D. 286; *Morison v. Thompson*, L. R. 9 Q. B. 480, as to the right of a principal to profits made by his agent or sub-agent. Compare *Great Western Insur. Co. v. Cunliffe*, 9 Ch. 525, and *Baring v. Stanton*, 3 Ch. D. 502, where the agent's profits were a part of his remuneration.

them. The estate was subject to several incumbrances, which were to be discharged out of the purchase money. The defendant had abatements made to him by some of the incumbrancers of several sums due for interest and otherwise, which they in consideration of services and friendship agreed should be to his own use. However, on a bill brought against him by his co-purchaser for an account of the rents and profits, the Court would not allow the defendant the exclusive benefit of these abatements, but held that he must account for them; the purchase being made for the equal benefit of both parties, and on a mutual trust between them.

Renewing leases.—It has been decided more than once, that if one partner obtains in his own name, either during the partnership or before its assets have been sold, a renewal of a lease of the partnership property, he will not be allowed to treat this renewed lease as his own and as one in which his co-partners have no interest.¹

Clandestine renewal.—This was laid down and acted on by Sir Wm. Grant in the celebrated case of *Featherstonhaugh v. Fenwick* (s), where two partners having obtained in their own names a renewal of the lease of the partnership premises, immediately dissolved the partnership, and sought to exclude the plaintiff, their co-partner, from all interest in the new lease: but in taking the accounts of the partnership, the new lease was held to be part of the assets of the firm.

Clegg v. Fishwick (t) is another case to the same [*308] effect. *There the plaintiff was the administratrix

(s) <i>Featherstonhaugh v. Fenwick</i>, 17 Ves. 298. In such cases the other partners cannot restrain the landlord from granting the lease to the one partner only. Their remedy is to	treat the lessee as a trustee for the firm, <i>Alder v. Fouracre</i>, 3 Swanst. 489. (t) 1 Mac. & G. 294. See, too, <i>Clements v. Hall</i>, 2 De G. & J. 173, and 24 Beav. 333.
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¹ That one partner cannot secretly take to himself a lease, during the partnership, of the premises where the business is carried on, *Leach v. Leach*, 18 Pick. 68; *Struthers v. Pearce*, 51 N. Y. 357; *Mitchell v. Reed*, 61 N. Y. 123; *Chamberlain v. Chamberlain*, 44 N. Y. Supr. Ct. 116 (12 Jones & S. 116); *Dougherty v. Van Nostrand*, Hoff. 68; *Lacy v. Hall*, 37 Penn. St. 360; *Seibert v. Seibert*, 1 Brews. (Penn.) 531, *Johnson's Appeal*, 115 Penn. St. 129. See, however, *Otis v. Sill*, 8 Barb. 102.

Where the license to work a coal area had issued to one partner for the benefit of the firm and had not expired, but the partnership was dissolved and that partner, after the dissolution, had taken a lease of the area, held, that the other partner was interested in the lease and the defendant took the lease as trustee for the two. *Eaton v. Weatherbee*, Russell's Eq. Rep. 48 (N. S.).

of one of several partners in a coal mine, and she filed a bill, some years after the death of the deceased, against the surviving partners, for an account and a dissolution, and for a declaration that a renewed lease, which had been obtained by the defendants, might be declared subject in equity to a trust for the benefit of the partnership. A twofold defence was set up, viz., first, that the old partnership ended with the old lease, and that the plaintiff could not therefore claim any interest in the new lease; and secondly, that she had some time before the filing of the bill, assigned all the share of the deceased to his children; and that she, therefore, at any rate, had no right to institute proceedings respecting such share. It was, however, decided first, that the old lease was the foundation for the new one, and that parties interested jointly with others in a lease, could not take the benefit of a renewal to the exclusion of those others; and secondly, that what had been assigned by the plaintiff, was the share of the deceased in the partnership, which share had never been ascertained; and that the effect of the assignment was merely to constitute her a trustee of the share for the assignees after she had got it in, and not to deprive her of her power to call for a realisation of the partnership property.

Open renewal. — In both of these cases the renewal of the lease was clandestine. But that is not an essential feature. In the more recent and very important case of *Clegg v. Edmondson* (*u*), the partnership was at will; the managing partners gave notice of dissolution and of their intention to renew the old lease for their own benefit. They afterwards did so, the other partners protesting, and there was evidence to show that the landlord objected to renew to any persons except the managing partners (*x*). It was held, however, that it was not competent for the managing partners thus to acquire for themselves alone the benefit of the renewed lease (*y*).

Right to reject renewed lease. — A partner by renewing a lease against the will of his co-partners, *can- [*309]

(*u*) 8 De G. Mc. & G. 787.

(*x*) See as to this, *Fitzgibbon v. Scanlan*, 1 Dow. 269.

(*y*) At the same time relief against them was refused on the ground of

laches and delay on the part of the plaintiffs. On this point the case will be noticed hereafter. See book iii. c. 10, § 3.

not force it on them and compel them to treat the property comprised in it as acquired for the firm, unless there is some agreement binding them so to do (z).

Benefits derived from use of partnership property. — The principle which precludes a partner from retaining for himself benefits which he ought to share with his co-partners, is applied to cases in which unfairness and misconduct are by no means so apparent as in those just cited. A high standard of honour requires that no partner shall derive any exclusive advantage by the employment of the partnership property, or by engaging in transactions in rivalry with the firm.

Profits of tally shop. — Thus, in *Burton v. Wookey (a)*, the plaintiff and the defendant were partners as dealers in *lapis calaminaris*. The defendant who was a shopkeeper, lived near the mines in which the ore was got, and he purchased it of the miners. Instead, however, of paying them with money, he paid them with shop goods, and in his account with the plaintiff charged him as for cash paid to the amount of the *selling* price of the goods. The plaintiff contended that the price of the ore ought, as between himself and the defendant, to be considered as being the *cost* price of the goods given in exchange for it, and that the profit made by the exchange ought to be accounted for to the partnership. The Court adopted this view; holding that it was the duty of the defendant to buy the ore at the lowest possible price, and to charge the partnership with no more than he actually gave for the goods bartered for the ore. An account of the profit made by the defendant in his barter of the goods was decreed accordingly.

Part-owners of ships. — Again, in *Gardner v. McCutcheon (b)*, a ship of which the plaintiffs and the defendant were part-owners and the defendant was master, was [*310] employed for the common benefit of all in *trading and carrying under charter. The defendant, during

(z) *Clements v. Norris*, 8 Ch. D. 129, where an attempt of this sort was defeated.

(a) 6 Madd. 367.

(b) 4 Beav. 534. See, too, *Benson v. Heathorn*, 1 Y. & C. C. C. 326, and 2 Coll. 309; *Miller v. Mackay*, 31 Beav. 77; *Shalleross v. Oldham*, 2 J. & H. 609; and as to commissions, *Holden v. Webber*, 29 Beav. 117.

Compare *Miller v. Mackay*, 34 Beav. 295, where the profits were held to belong to him who made them. In *Moffatt v. Farquharson*, 2 Bro. C. C. 338, a part-owner of a ship was held to be exclusively entitled to money paid him for his vote in the appointment of a master. But see on that case the note to it in Mr. Belt's edition. See *infra*, c. 4, § 1.

the time the ship was thus employed, traded on his own account and made considerable profit. It was held that he was bound to account for the profits thus obtained. He was bound to trade to the best of his ability for the joint interest of himself and co-owners; he had no right to employ the partnership property in a private speculation for his own benefit; and although he alleged that the profits were made solely by the employment of his own private capital, and that by custom masters of ships were allowed to trade for their own benefit, the Court declined to recognise any such custom, and considered that the profits had been made by the employment of what was not the defendant's exclusively, and that the plaintiffs had therefore a right to share them.

Benefits resulting from connection with the firm.—A partner, moreover, is not allowed in transacting the partnership affairs, to carry on for his own sole benefit any separate trade or business which, were it not for his connection with the partnership, he would not have been in a position to carry on. Bound to do his best for the firm, he is not at liberty to labour for himself to their detriment; and if his connection with the firm enables him to acquire gain, he cannot appropriate that gain to himself on the pretence that it arose from a separate transaction with which the firm had nothing to do. This is well exemplified by the cases as to renewed leases which have been already referred to (*c*), and by *Russell v. Austwick*, which also shows that the same principles apply wherever there is an agreement to share profits.

Carriers not partners inter se.—In *Russell v. Austwick* (*d*) several persons agreed to carry on business as carriers between London and Falmouth; *but, they expressly stipulated that no partnership should subsist between them*, and that each should have a certain portion of the road over which he was to carry. Business was commenced and carried on by the parties to this agreement under the name of Messrs. Russell & Co., and they were employed to carry bullion from Falmouth and Plymouth to London. On the *issue [*311] of a new silver coinage by the Bank of England, Austwick, who appears to have been the London agent of the

(*c*) *Ante*, p. 307.

(*d*) 1 Sim. 52. See, also, as to benefits derived by one co-owner of

a mine from the use of a shaft situate in his own land, but used for the mine, *Clegg v. Clegg*, 3 Giff. 322.

carriers, entered into a contract with the Master of the Mint for the carriage of the new coin to towns on the road between London and Falmouth. Shortly afterwards he entered into another contract with the Master of the Mint for the conveyance of more new coin to towns in Middlesex, and the adjoining counties. None of these last towns lay on the road leading from London to Falmouth, and many of them were only accessible by cross country roads, and in consequence of the increased risk of carriage along these roads, the Mint authorities agreed to pay 7*s.* 6*d.* per cent. *for all the coin sent from the Mint*, instead of 5*s.* per cent., which was the remuneration agreed on in the first contract. Austwick contended that he was entitled to the whole benefit of this second contract, because (except as to the extra 2*s.* 6*d.*) it had nothing to do with the carrying business between London and Falmouth; and because, as to the 2*s.* 6*d.*, that sum, although calculated on all the coin carried, whether under the first or the second agreement, was in fact paid by the Mint in consideration only of the extra risk attending the carriage to the towns specified in the second contract. On the other hand it was contended and held, that the second agreement ought to be considered as made on account of all the persons interested in the first agreement; because, although the common concern had no connection with the provincial roads which were the occasion of the second agreement, yet this agreement was entered into by the officers of the Mint as connected with, and a continuation of, the first agreement, and in confidence of the responsibility of the parties to it.

This case of *Russell v. Austwick* shows how difficult it is for a partner to benefit himself exclusively, by dealings which in honour he ought not to have engaged in except for the common benefit of the firm.

Distinct businesses.—*Lock v. Lynam*, which came before the Court of Chancery in Ireland, affords another instructive example of the application of the same wholesome [*312] doctrine. In this case (*e*) the plaintiff * and the defendant had agreed to share the profit and loss arising from contracts taken by the defendant for the supply of meat and bread to Her Majesty's forces in Ireland. Whilst

(*e*) *Lock v. Lynam*, 4 Ir. Ch. 188. *Miller v. Mackay*, 34 Beav. 295; and Compare this and the last case with *see Somerville v. Mackay*, 18 Ves. 382.

this agreement was in force the defendant entered into secret agreements with other persons to share with them the profit and loss accruing in respect of similar contracts entered into and taken by them. The plaintiff claimed a share in the profits made by the defendant under these secret agreements; whilst the defendant contended that he was entitled to retain them for his own exclusive benefit. The Lord Chancellor observed, that in all cases of this kind the real question was, whether, from the nature of the transaction between the partners, there was any express or implied contract against other dealings of a like character; and that although there was no engagement not to enter into any other partnership of the same kind, still it never could have been in the contemplation of either of the parties that one partner should, in his own name or in that of any other person, adopt contracts to the prejudice of the other's interest. A decree was accordingly made directing an enquiry whether, during the period for which any partnership between the plaintiff and the defendant existed, the defendant, either alone or jointly with any other person or persons, separately from the plaintiff, entered into, or was beneficially interested in, any other contract or dealing of the like nature with those in which the plaintiff and the defendant were engaged as partners.

One partner competing with firm.—After the decisions to which attention has now been drawn, there can be little doubt that a partner cannot, either openly or secretly, lawfully carry on for his own benefit any business in rivalry with the firm to which he belongs (*f*). But where a partner carries on a business not connected with or competing with that of the firm, his partners have no right to the profits he thereby makes, even if he has agreed not to carry on any separate business (*g*).¹

(*f*) See *Glassington v. Thwaites*, 1 Sim. & Stu. 124; *England v. Curling*, 8 Beav. 129, in which, however, there was something more than mere rivalry.

(*g*) *Dean v. Maedowell*, 8 Ch. D. 345. An injunction might have been obtained, and perhaps damages for a breach of covenant.

¹ And the true construction of the rule requires each partner to show proper consideration for the other.

In action for damages against a partner for not having furnished certain machines to the partnership according to contract, held, that the agreement to furnish as soon as possible must be construed to allow the contracting partner a reasonable time. *Pelletier v. Rousseau*, 9 Quebec L. R. 186.

[*313] * **Buying share.**—Again, it has been held competent for one partner to acquire for himself the share of a co-partner in the partnership business, without informing the other partners of the purchase, and without giving them an opportunity of acquiring it (*h*). The articles of partnership did not forbid such a purchase; nor was it any part of the business of the firm to buy the shares of its members.

(*h*) *Cassels v. Stewart*, 6 App. Ca. 64.

Plaintiff and defendants were co-partners to work mining areas. Plaintiff did not pay his share of the expenses, and one of defendants wrote him that if he did not pay by a certain date he should consider that he intended to withdraw from the adventure. He received no reply, and wrote to plaintiff, enclosing what plaintiff had paid. To this plaintiff answered reluctantly, accepting the money, and concluding, "Now that I am no participator with you in the tribute, let your mind rest quiet," etc. The mine prospered and plaintiff brought action for an account. Dismissed with costs. *Hamilton v. Hamilton*, Russell's Eq. Reports, 78 (N. S.).

Plaintiff paid only a part of his agreed contributions towards a partnership in carrying on a farm, and had denied his liability and declared his inability to pay and his desire to withdraw. Held, that he had not forfeited his interest, but should pay up his contributions with interest at eight per cent. with half-yearly rests, the partnership to be dissolved as from date of decree. *Dobbs v. Bromfield*, 4 Australian J. R. 8 (Victoria).

Plaintiff and one of defendant's partners in purchase of mining shares, defendant paying his half and advancing plaintiff money to pay the other half, said defendant induced plaintiff to enter the shares in the name of the other defendant for whom he was acting, as afterwards appeared.

Plaintiff became a director in the mining company, and when the shares appeared to involve a liability instead of a gain, he joined in forfeiting them and denied his interest in them.

Held, that by such conduct he had not forfeited his right to a half share of them, nor by delay of six years in instituting suit, during which time he had been actively engaged in the interests of the mining company. *McEwing v. Auld*, 4 Australian J. R. 13, 49 (Victoria).

A partner resigning his share in a mining claim and lying by for nine years, was held debarred by his negligence from asserting his rights in such share. *Cohn v. Heine*, Argus Reports, Nov. 1, 1867 (Victoria); *Kerford & Box*, Dig. p. 375.

Two years' dissent, &c., not a case of laches. *Heine v. Klein*, Argus Reports, March 22, 1861 (Victoria); *Kerford & Box*, Dig. p. 480. And see *Fawson v. Noonan*, Russell's Eq. Rep. 377 (N. S.); *Harvey v. Varney*, 104 Mass. 436; *Johnson v. Colclough*, *supra*, 4 Australian J. R. 53, 131 (Victoria); *Clarke v. Gouge*, 5 Victorian L. R. L. 468.

But the rule of utmost good faith will not be carried beyond its proper limits and receive a strained construction, requiring partners to account for transactions wholly outside the partnership, and not within the scope of the partnership business. B. & M. were partners. M. associated himself with two others in building a warehouse outside the partnership. B. & M. as a firm prepared certain parts of the work for the warehouse, and sold such parts to the other firm engaged in building, but these parts at time of dissolution of B. & M. were inconsiderable. Held, that B. had no claim against M. for a share of the profits made in the building outside partnership. *Berger v. Metivier*, 1 Quebec App. 227.

Partnership not yet formed.—The same obligation to act with good faith exists between persons who have agreed to become partners; and if one of them in negotiating for the acquisition of property for the intended firm, receives a bonus or commission, he must account for it to the firm

A. agreed with B. to furnish funds to work mines, and after securing title give B. an undivided third. B. sold his interest in the agreement to C. for \$100, and one-half the future profits of the undivided third. C. sold half-interest to D. for \$1125. Held, that B. could not claim any portion of this sum. *Loucks v. Wallbridge*, 31 Ont. Q. B. 32.

Where one of two partners in a purchase of real estate sold "his interest" to a syndicate, of which he was one, and realized a large profit thereon, held, that the other had no interest in that profit. *Mitchell v. Gormley*, 9 Ont. 139; affirmed, 14 Ont. App. 55.

Co-adventurers in the purchase of a mine may purchase singly after the expiration of the contract time within which they were given an opportunity to purchase. Before the expiration of the time, two of them negotiated with the offerer to purchase for themselves, after the expiration of the time of the offer which the three had associated to accept. Held, that the two were not guilty of any breach of partnership confidence toward the third. *Pokorney v. Ditchburne*, 6 W. W. & A'B. Eq. 284 (Victoria).

Plaintiff was a sleeping partner in a block-mining claim. Defendant was his working substitute, paid by "half the gold obtained for plaintiff's share." Defendant discovered a new lead, and obtained a "prospector's claim" on it. Held, that plaintiff took no interest in it. *Perry v. Morton*, Argus Reports, Nov. 26, 1858 (Victoria); *Kerford & Box*, Dig. p. 566.

There is nothing to prevent each partner from continuing the same kind of business in another place, or from soliciting a continuance of the business to himself, and no obligation to so conduct the business to the end of the term as to preserve the good-will, provided neither untruly allege that the other will not continue (case of bonded storekeepers unable to agree, &c.); *Cornwall v. Hicks*, 5 Australian J. R. 61 (Victoria).

J. & T. dissolved, and amongst other terms of arrangement J. promised that he would not again start in the same business in the same place, but he refused to sign any writing to that effect. Held, that J.'s breaking his word would not excuse T. from carrying out the other terms of the agreement. *Jennings v. Tivey*, 6 W. W. & A'B. Eq. 152 (Victoria).

Where the plaintiff and defendant had agreed to be partners for the catch of two schools of mackerel, and after each had in his berth caught one school and divided, and the plaintiff moved off to another berth, and defendant remaining in his own berth made a very large catch, 250 barrels, held, that plaintiff was not entitled to a share of it, especially as being present when the large catch was made, and seeing defendant's seine in danger, he neither offered his services, nor the use of his seine. *Fawson v. Noonan*, Russell's Eq. Rep. 377 (N. S.).

An honest over-estimate of the firm's indebtedness by selling partner, not shown to have been relied upon except by himself in making an offer to buy or sell at a specific price, at which offer the other bought, was held not to vitiate the sale. *Sexton v. Sexton*, 9 Gratt. 204.

On a bill by an administrator of a partner against the remaining partners for an account they should be charged only with what by *reasonable care and diligence* they should have realized from the partnership property; charging them with everything at the date of the decedent's death at its value at that

when formed (*i*). He cannot retain it for himself on the ground that it was paid him for personal services rendered to the vendor before any partnership existed. Having obtained the benefit, whilst negotiating for himself and his future partners, he must share such benefit with them (*k*).

SECTION III. — OF THE POWERS OF A MAJORITY OF PARTNERS.

Disputes between partners.—In the event of a difference arising between partners, it becomes necessary to consider whether there is any method of determining which of them is to give way to the other. It is not uncommonly supposed that the minority of the partners, if they are unequally divided, must submit to the majority. But this is by no means the case; for, as will be seen presently, the majority cannot oblige the minority except within certain limits.

How to be settled.—The first point to determine is, whether the partnership articles do or do not contain any

(*i*) *Fawcett v. Whitehouse*, 1 R. & Congreve, 1 R. & M. 150, and other cases of that class, relating to promoters of companies.

(*k*) *Ibid.* See, also, *Hichens v.*

time, is not the true rule. *Moore v. Huntington*, 17 Warr. 417, 21 L. ed. 642; but see *Klotz v. Macready*, 39 La. Ann. 638.

Where a partnership settlement was made on the basis that one partner was liable to pay certain obligations incurred on partnership account, and the estate of such partner was afterwards relieved from the liability, the settlement could not be impeached in consequence, having been made with a full knowledge of all the facts. *Bispham v. Price*, 15 How. 162, 14 L. ed. 644.

Where on a bill for an account one of the firm was appointed receiver, and as such used the money received and made a profit on it, held, that the other partner was not entitled to share in this profit. *Whitesides v. Lafferty*, 3 Humph. 150.

One partner with his partner's knowledge sold partnership coal at its full market value to another firm, of which he was also a member, and which bought to fill contracts at an advanced price, held, that he was not required to account for his profit in the second firm. *Freck v. Blackeston*, 83 Penn. St. 474. See also *King v. Whiton*, 15 Wis. 684; *Wheeler v. Sage*, 1 Wall. 518; *McKenzie v. Dickinson*, 43 Cal. 119; *Drew v. Beard*, 107 Mass. 64; *Parnell v. Robinson*, 58 Ga. 27; *Lowry v. Cobb*, 9 La. Ann. 592; *Cobb v. Parham*, 4 id. 148; *Parham v. Cobb*, 7 id. 157; *Nicholson v. Janeway*, 16 N. J. Eq. 285. *Geddes' Appeal*, 80 Penn. St. 482; *Bradbury v. Barnes*, 19 Cal. 120.

express provision applicable to the matter in question; for if they do, such provision ought to be obeyed (*l*). If they do not, then the nature of the *question at [*314] issue must be examined; for there is an important distinction between differences which relate to matters incidental to carrying on the legitimate business of a partnership, and differences which relate to matters with which it was never intended that the partnership should concern itself.

Disputes on matters arising in ordinary course of business. — With respect to the first class of differences, regard must be had to the state of things actually existing; for, as a rule, if the partners are equally divided, those who forbid a change must have their way: *in re communi potior est conditio prohibentis* (*m*). Upon this principle it is that one partner cannot either engage a new or dismiss an old servant against the will of his co-partner (*n*); nor, if the lease of the partnership place of business expires, insist on renewing the lease and continuing the business at the old place (*o*).

Power of majority in such cases. — If, however, in a case of this description, unprovided for by previous agreement, the partners are unequally divided, the minority must, the author apprehends, give way to the majority (*p*).¹ This is the

(*l*) As to the construction of partnership articles, see *infra*, c. 9.

(*m*) But see as to the employment of a ship, Abbott on Shipping, p. 82, ed. 9, and p. 58, ed. 12; and as to completing contracts already entered into, Butchart v. Dresser, 4 De G. M. & G. 545.

(*n*) See Donaldson v. Williamson, 1 Cr. & M. 345.

(*o*) Clements v. Norris, 8 Ch. D. 129. N.B. — The partnership had not expired.

(*p*) See Gregory v. Patchett, 33 Beav. 595; Const v. Harris, T. & R. 518; Robinson v. Thompson, 1 Vern. 465; as to opening accounts, Morgan's case, 1 M. & G. 235.

¹ The power of the majority to bind the firm is restricted to transactions within the scope of the partnership business and in furtherance of its objects, or, at least, not inconsistent with them nor with the continuance of the firm's existence for those purposes for which it was formed. Southern Steam Packet Co. v. McGrath, McMull. 93 (So. Car.); Lamalere v. Caze, 1 Wash. C. C. 435; Abbott v. Johnson, 32 N. H. 9; Livingston v. Lynch, 4 Johns. Ch. 573; Gansevoort v. Kennedy, 30 Barb. 279; Cooke v. Allison, 30 La. Ann. 963; Zabriskie v. Hackensack & c. R. R. Co., 18 N. J. Eq. 178, 183; Moore v. Knott, 12 Oregon, 260; Chadsey v. Harrison, 11 Ill. 151; Bun v. Morris, 1 Caines, 54; Harter v. Wrigley, 48 Ga. 495.

In Kirk v. Hodgson, 3 Johns. Ch. 400, the majority retained a clerk who had appropriated money of the firm, and he thereby became entitled to an increased compensation contemplated by his agreement of hiring. The act of the majority was held to bind the firm, being in good faith.

rule applicable to companies whether incorporated or unincorporated (*q*): it is the rule adopted in the Indian contract act (*r*): and it is practically reasonable and convenient. The only alternative is to hold that if partners disagree, even as to trifling matters of detail, the minority can forbid all change, and perhaps bring the business of the firm to a deadlock, for which the only remedy is a dissolution. At the same time the author is not aware of any clear and distinct authority in support of the proposition that even in such matters a dissentient partner must give way to his co-partners (*s*).

However, a majority cannot against the will of the [*315] minority *delegate to a manager the right to sign the partnership name (*t*); and it is doubtful whether a majority can decide where the partnership business shall be carried on when the lease of its place of business expires (*u*).

All partners entitled to be heard. — A very important rule respecting the powers and votes of majorities is, that a

(*q*) See *Stevens v. South Devon Rail. Co.*, 9 Ha. 326; *Simpson v. Westminster Palace Hotel Co.*, 2 De G. F. & J. 141; *Kent v. Jackson*, 2 De G. M. & G. 49; and 14 Beav. 367.

(*r*) § 253, cl. 5.

(*s*) Pollock's Dig. § 36, adopts the

author's view, but apparently on his authority.

(*t*) See *Beveridge v. Beveridge*, L. R. 2 Sc. App. 183.

(*u*) See *Clements v. Norris*, 8 Ch. D. 129, but note there the firm consisted of two members only.

The retention by one partner of a manager who had been dismissed by the majority, who were to control, entitles the other partners to a dissolution. *Newton v. Doran*, 1 Ont. Chy. 590. See also *Kirk v. Hodgson*, 3 Johns. Chy. 400; *Campbell v. Bowen*, 49 Ga. 417; *Irvine v. Fobes*, 11 Barb. 587; *Johnston v. Dutton*, 27 Ala. 245; *Waterbury v. Express Co.*, 50 Barb. 157, s. c. 3 Abb. Pr. (N. S.) 163; *Western Stage Co. v. Walker*, 2 Iowa, 504; *Steele v. First Nat. Bank*, 60 Ill. 23; *Noyes v. New Haven*, New Lond. & Ston. R. R. Co., 30 Conn. 1; *Yeager v. Wallace*, 57 Penn. St. 365; *Livingston v. Lynch*, 4 Johns. Chy. 573; *Peacock v. Cummings*, 5 Phila. 253, 46 Penn. St. 434; *Rhea v. Vannoy*, 1 Jones Eq. 282, 290; *Gansevoort v. Kennedy*, 30 Barb. 279; *Nolan v. Lovelock*, 1 Mont. 224; *Dougherty v. Creary*, 30 Cal. 290; *Faulds v. Yates*, 57 Ill. 416; *Carrithers v. Jarrell*, 20 Ga. 842; *C. B. & Q. R. R. Co. v. Hoyt*, 1 Ill. App. 374; *Zabriskie v. Hackensack & N. Y. R. R. Co.*, 18 N. J. Eq. 178; *Gow. Partn.* 3d ed., c. 2, § 2, p. 52, and note of Ingraham, American editor.

When two out of three partners concurred in giving, during the partnership, the firm note for necessary supplies ordered by one of them for the hands engaged in carrying on the business, that of running a steam saw-mill, the partnership is bound by it — notwithstanding the third partner gives notice of his dissent before the contract is made. *Johnston v. Dutton*, 27 Ala. 245.

Consent of a majority to sale of share is obtained when the one who sells gets another of the three to consent. *Re Anderson*, 5 Victorian L. R. Eq. 123.

majority, to have any weight, must act and be constituted with perfect good faith; for every partner has a right to be consulted, to express his own views, and to have those views considered by his co-partners.¹ In the language of Lord Eldon, "that is the act of all which is the act of the majority provided all are consulted, and the majority are acting *bonâ fide*, meeting not for the purpose of negating what any one may have to offer, but for the purpose of negating what, when they are met together, they may after due consideration think proper to negative. For a majority of partners to say, We do not care what one partner may say; we, being the majority, will do what we please, is, I apprehend, what a court of equity will not allow" (*x*).

Majorities at meetings. — Moreover, where powers are conferred on a majority present at a meeting of not less than a certain number of persons, unless such meeting be duly convened and the requisite number be present at the meeting the powers in question cannot be exercised; and although it may be true that the required number of persons was summoned, and that the absentees could not have turned the scale, this will not render valid the acts of the majority of those actually present, for that is not such a majority as was originally contemplated (*y*).

2. Disputes on matters involving a change in the nature of the business. — Passing now to the second class of differences, viz., those which relate to matters with which the partnership was never intended to concern itself, it has been over and over again decided that no majority, however large, can lawfully engage the partnership in such matters against the will of even one dissentient partner.

One dissentient can forbid a change. — Each partner is entitled to say to the * others, "I became a part- [*316] ner in a concern formed for a definite purpose, and

(*x*) *Const v. Harris*, Turn. & R. 525, and see *ib.* 518, and *Blisset v. Daniel*, 10 Ha. 493; *Great Western Rail. Co. v. Rushout*, 5 De G. & Sm. 310.

(*y*) See *Re London and Southern*

Counties Freehold Land Co., 31 Ch. D. 223; *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *Ex parte Morrison*, De G. 539.

¹ When a contract made by a majority of a firm is not made in good faith as to the other partners, the interest of the partners making it alone passes to the purchaser, and he becomes a joint owner with the partners whose interest did not pass. *Western Stage Co. v. Walker*, 2 Iowa, 504.

upon terms which were agreed upon by all of us, and you have no right, without my consent, to engage me in any other concern, nor to hold me to any other terms, nor to get rid of me, if I decline to assent to a variation in the agreement by which you are bound to me and I to you." Nor is it at all material that the new business is extremely profitable (z).

In companies as well as in partnership.—This principle is applicable to all partnerships and companies, whether great or small, and is evidently one which requires only to be stated to be at once assented to as being just. No cases upon this subject can be referred to with greater advantage than *Natusch v. Irving* and *Const v. Harris*, both of which were decided by Lord Eldon (a).

Fire and Life Insurance Company turning into a Maritime Insurance Company.—In *Natusch v. Irving* (b), a company was formed in the early part of the year 1824 for granting fire and life assurances. The capital was 5,000,000*l.*, divided into fifty thousand 100*l.* shares. The plaintiff was one of the original subscribers, and held fifteen shares, in respect of which he had paid the required deposit, but he had not executed the company's deed of settlement. In conformity with the rules of the company he had effected a policy with it on his life for 1500*l.* In the summer of 1824, the act of 6 Geo. 1, prohibiting companies from carrying on the business of marine insurance, was repealed, and shortly afterwards advertisements appeared in the newspapers, stating that the company would commence the business of marine insurance. The plaintiff, in answer to an inquiry whether this announcement was authorised by the directors, was informed that it was, and that if he objected to the course about to be pursued he might receive back his deposit with interest, and have his policy cancelled and the premium returned. In reply to this, the plaintiff stated that he was ready to execute any deed which was in conformity with the prospectus: that he conceived it competent for him to insist that the business in which he was a partner should be carried

(z) *A.-G. v. Great Northern Rail. Co.*, 1 Dr. & Sm. 154.

(a) See, too, *Davies v. Hawkins*, 3 M. & S. 488; *Fennings v. Gren-*

ville, 1 Taunt. 241; *Glassington v. Thwaites*, 1 Sim. & Stu. 131.

(b) *Gow on Partnership*, App. 398, ed. 3. See, also, *The Phoenix Life Insur. Co.*, 2 J. & H. 441.

* on according to the agreement which united the [*317] partners together: that he could not think his doing so would entitle the managers of that partnership to pay him out his capital, and deprive him of a share in a concern of which he had the highest opinion; that he therefore required the directors to abstain from any contracts or engagements relating to marine insurance, as not being contemplated by himself and those who joined the company upon the terms of the prospectus, and that he required an undivided attention on the part of the directors to the objects defined therein. The plaintiff afterwards attended at the office of the company, to execute its deed of settlement, but finding that it contained provisions enabling the company to carry on the business of marine insurance, he refused to execute it, as not being conformable to the terms on which the company was formed. In pursuance of the advertisements, the company had commenced, and it was carrying on, the business of marine insurance; but there was no evidence to show acquiescence on the part of the plaintiff, and there was evidence to show continued opposition by him to the carrying on of such business. The plaintiff applied for an injunction to restrain the directors from effecting marine insurances, and an injunction was granted (*c*). The judgment of Lord Eldon, as far as it relates to the power of a majority, is particularly valuable, and the following extracts from it are constantly referred to.

Answer to objection that dissentient can retire.—With respect to the liberty given to the plaintiff to retire, his lordship said: “An offer is made to the plaintiff that he may receive back his deposit, with interest from the date of the payment, and he is desired to consider himself as having received notice thereof. But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and in effect, merely by compelling them to retire upon such terms, so to form a new company. This would, as to partnership, be a most dangerous doctrine.

(*c*) The bill was filed by the plaintiff on behalf of himself and all others the shareholders of the company against the directors, and prayed a dissolution, and, if necessary, a receiver, and an injunction

to restrain the defendants from effecting marine insurances in the name and on account of the company, and from using the name, and from applying the capital of the company for such purposes.

[*318] ***Dissentient need not accept an offer of indemnity.**—Where a partnership is dissolved (even where it can be in a sense dissolved the instant after notice to dissolve is given, if there be no contract to the contrary), it must still continue for the purpose of winding-up its affairs, of taking and settling all its accounts, and converting all the property, means, and assests of the partnership, existing at the time of the dissolution, as beneficially as may be, for the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him to whom they have given an offer of his deposit and interest, Take that, and we are a new company, keeping the effects, means, assets, and property of the old, as the property of the new partnership. The company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in. A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason: it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the loss which his partners would suffer by a dissolution, is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares."

Answer to argument that the change was warranted by statute.—With respect to the alteration of the law enabling companies to carry on the business proposed, his lordship observed: "The repeal of the act 6 Geo. 1, which merely made it lawful for societies or partnerships, however numerous their members might be, to insure against marine risks, could not make it lawful for companies or societies, which were formed for specified purposes of insurances upon lives and against fire, to insure against marine risks, unless the contracts by which such companies were formed, either expressly or impliedly (where individual partners did not consent to embarking in new projects, either originally, or subsequently to the formation of the companies), created an authority in some part of the body to bind all the body to the adoption of such new undertakings."

Observations on powers of majorities.—With respect to the power of a majority, his lordship laid it down that, "If six persons joined in a partnership of life assurance, it seems clear that neither the majority nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power: because if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent. But if a part of the six openly and publicly professed their intention to engage the partnership in another concern, and clearly and distinctly brought this to the knowledge of one or more of the other partners, and such one or more of the other partners could be clearly shown to have acquiesced in such intention, and to have per-

mitted the other partners to have entered upon, and to have engaged themselves and the body in such new projects, and thereby to have placed their partners so engaged in difficulties and embarrassments unless they were permitted to proceed in the farther execution of such projects, if a court of equity would not go the length of holding that such conduct was *consent, it would scarcely think parties so [*319] conducting themselves entitled to the *festinum remedium* of injunction." * * * * "Courts must struggle to prevent particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to or empowered, or acquiesced in, expressly or tacitly, so as to make it not equitable that they should seek to restrain them. The principles which a Court would act upon in the case of a partnership of six, must, as far as the nature of things will admit, be applied to a partnership of 600." * * * "They who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly or tacitly acquiesce."

Altering principle on which profits should be dealt with.—In *Const v. Harris* (*d*), the proprietors of Covent Garden Theatre agreed that the profits should be exclusively appropriated to certain definite purposes. Afterwards, the proprietors of seven out of eight shares, entered into an agreement to apply the profits in a different manner, but they had not consulted the owner of the other eighth share, and he disapproved of the alteration. It was held by Lord Eldon, that the majority had no power to depart from the terms of the original agreement; and upon a bill filed by the one dissentient partner for a specific performance of that agreement, a receiver of the profits was appointed. In a long and elaborate judgment, Lord Eldon distinctly recognised the principle, that articles which had been agreed on to regulate a partnership, cannot be altered without the consent of *all* the partners (*e*).

In modern times the same principle has been constantly recognised and followed. Indeed it is never now disputed, although its application frequently gives rise to controversy. The decisions bearing on this subject relate, however, to companies, and are not, therefore, further noticed in the present treatise (*f*).

(*d*) Turn. & R. 496.

(*e*) See Turn. & R. 517, 523. The whole judgment is well worthy of attentive perusal; but being much to the same effect as that in *Natusch*

v. Irving, the writer has not felt it necessary to make extracts from it.

(*f*) *Auld v. Glasgow Working Men's Building Soc.*, 12 App. Ca. 197, is one of the most recent cases.

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*CHAPTER III.

OF THE CAPITAL OF PARTNERSHIPS.

Capital of partnerships.—By the capital of a partnership is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business, and intended to be risked by them in that business. The capital of a partnership is not therefore the same as its property: the capital is a sum fixed by the agreement of the partners; whilst the actual assets of the firm vary from day to day, and include everything belonging to the firm and having any money value. Moreover, the capital of each partner is not necessarily the amount due to him from the firm; for not only may he owe the firm money, so that less than his capital is due to him; but the firm may owe him money in addition to his capital, *e.g.*, for money advanced by him to the firm by way of loan, and not intended to be wholly risked in the business.¹ The distinction be-

¹ Postponement of division of profits until capital advanced by one of the partners is repaid with interest is immaterial. *Beauregard v. Case*, 91 U. S. 134, 23 L. ed. 263.

An oral agreement whereby one is to contribute his inchoate interest in an invention, and the other to furnish the necessary funds to make the invention available in the form of a patent, and both to contribute their services to make it remunerative, is an agreement for a partnership, and when obtained the patent is in equity partnership property, in whosoever name the letters-patent are taken out. *Somerby v. Buntin*, 118 Mass. 279.

In *Topping v. Paddock*, 92 Ill. 92, the amount due to a book-keeper was placed to his credit on the books of a new firm of which he was a member. This was held to be a loan to be repaid to him with his share of the profits, and not capital. See also *Sexton v. Lamb*, 27 Kan. 426; *Mathers v. Patterson*, 33 Penn. St. 485; *Stafford v. Fargo*, 35 Ill. 481; *Nutting v. Ashcroft*, 101 Mass. 300.

The partnership formed is a moral being distinct from its members; it is a civil person with peculiar rights and attributes; the partners are not owners of the partnership property, but only of the residuum. The partnership property belongs to this ideal being, with which it may fulfil its obligations, and the partners' interest is subordinate to the interest of the creditors. *Succession of Pileher*, 39 La. Ann. 362.

Partnership proved, the presumption is equal shares. *Kilpatrick v. Mackay*, 4 Victorian L. R. Eq. 28; *Gould v. Gould*, 6 Wend. 263; *Harrison v. Sterry*, 5 Cranch, 289.

tween a partner's capital and what is due to him for advances by way of loan to the firm, is frequently very material: *e.g.*, with reference to interest; with reference to clauses in partnership articles fixing the amount of capital to be advanced and risked, and prohibiting the withdrawal of capital; and above all with reference to priority of payment in the event of dissolution and a deficiency of assets (*a*). The amount of each partner's capital ought, therefore, always to be accurately stated, in order to avoid disputes on a final adjustment of accounts; and this is more important where the capitals of the partners are unequal, for if there is no evidence as to the amounts contributed by them, the shares of the whole assets will be treated as equal (*b*).

*** Increase and diminution of capital.** — When the [*321] agreed amount of capital of a partnership has been exhausted, and the business cannot be carried on to a profit, the partnership may be dissolved, as will be pointed out hereafter (*c*). A partner cannot be compelled to furnish more capital than he has agreed to bring in and risk; although he cannot, by limiting the amount of his capital, limit his liability for debts incurred by the firm (*d*). On the other hand, a partner who has agreed to furnish a certain amount of capital, is bound not only to bring it into the firm, but also to leave it in the business until the firm is dissolved.

It follows from these considerations that the agreed capital of a partnership cannot be either added to or withdrawn except with the consent of all the members of the partnership (*e*); and this rule is perfectly consistent with the obvious fact, that the assets and liabilities of a partnership are necessarily liable to fluctuation, and that the value of each partner's share of such assets constantly fluctuates also.

Borrowing money and increasing capital. — The difference between borrowing money on the credit of a firm and increasing its capital, has been already adverted to (*f*); and it has been seen that although each member of an ordinary trading partnership can pledge its credit for money borrowed in

(*a*) See on this subject, *infra*, book iii. ch. 8, § 1, on partnership accounts.

(*b*) See as to the equality of shares, *infra*, book iii. ch. 5. § 2.

(*c*) *Infra*, book iv. ch. 1, § 2.

(*d*) *Ante*, p. 200.

(*e*) See *Heslin v. Hay*, 15 L. R. Ir. 431, where an attempt was made to violate this rule; and see the obs. of Lord Bramwell in *Bouch v. Sproule*, 12 App. Ca. 405.

(*f*) *Ante*, pp. 132, 133.

order to carry on its business, he cannot render it liable to repay money borrowed by him to enable him to furnish the amount of capital which he has agreed to bring in (*g*).

(*g*) *Ib.*

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* CHAPTER IV.

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OF JOINT AND SEPARATE PROPERTY.

Partnership property. — The expressions partnership property, partnership stock, partnership assets, joint stock, and joint estate, are used indiscriminately to denote everything to which the firm, or in other words *all* the partners composing it, can be considered to be entitled as such (*a*). The qualification *as such* is important; for persons may be entitled jointly or in common to property, and the same persons may be partners, and yet that property may not be partnership property; *e.g.*, if several persons are partners in trade, and land is devised or a legacy is bequeathed to them jointly or in common, it will not necessarily become partnership property and form part of the common stock in which they are interested as partners (*b*). Whether it does so or does not, depends upon circumstances which will be examined hereafter.

Importance of distinguishing partnership property from the separate property of the partners. — It is often a difficult matter to determine what is to be regarded as partnership property, and what is to be regarded as the separate property of each partner. The question, however, is of importance not only to the partners themselves, but also to their creditors; for, as will be seen hereafter, if a firm becomes bankrupt, the property of the firm and the separate property of each partner have to be distinguished from each other, it being a rule to apply the property of the firm in the first place in payment of the creditors of the firm, and to apply the separate properties of the partners in the first place to the payment of their respective separate creditors.

* It is proposed, therefore, to examine the rules by [*323]

(*a*) The expression joint estate sometimes has a wider signification, including all property which, on the bankruptcy of the firm, is distributable amongst its creditors. See *post*, book iv. ch. 4, sec. 3, Reputed Ownership.

(*b*) *Morris v. Barrett*, 3 Y. & J. 384, and see the judgment in *Ex parte The Fife Banking Co.*, 6 Ir. Eq. 197, s. c. on appeal under the name of *Re Littles*, 10 ib. 275.

which to determine what is the property of the firm, and what the separate property of its members.

Question determined by agreement.—It is for the partners to determine by agreement amongst themselves what shall be the property of them all, and what shall be the separate property of some one or more of them. Moreover, it is competent for them by agreement amongst themselves to convert what is the joint property of all into the separate property of some one or more of them, and *vice versâ*. The determination, therefore, of the question, What is, and what is not the property of the firm? involves an inquiry into the three following subjects, viz.:—

Joint estate.

Separate estate.

Conversion of one into the other.

Each of these will be examined in order.

SECTION I.—OF JOINT ESTATE.

1. Property of the firm.—Whatever at the commencement of a partnership is thrown into the common stock, and whatever has from time to time during the continuance of the partnership been added thereto or obtained by means thereof, whether directly by purchase or circuitously by employment in trade, belongs to the firm, unless the contrary can be shown (*c*).¹

Property paid for by the firm.—The mere fact that the property in question was purchased by one partner in his own name is immaterial, if it was paid for out of the partnership monies; for in such a case he will be deemed to hold the property in trust for the firm, unless he can show that [*324] he holds it for himself alone (*d*). Upon this * principle it is held that land purchased in the name of

(*c*) See *Crawshay v. Collins*, 2 Russ. 339, as to the patents; *Nerot v. Burnand*, 4 Russ. 247, and 2 Bli. N. S. 415; *Bone v. Pollard*, 24 Beav. 283. See, also, as to co-owners of mines not being co-partners, *Clegg v. Clegg*, 3 Giff. 322. As to outlays

of partnership money on the separate property of one partner, see *infra*, § 2.

(*d*) See *per* Lord Eldon in *Smith v. Smith*, 5 Ves. 193; *Robley v. Brooke*, 7 Bli. 90; *Morris v. Barrett*, 3 Y. & J. 384. See, also, *Helmores v. Smith*, 35 Ch. D. 436.

¹ *Fourth National Bank v. New Orleans & Carrollton R. R. Co.*, 11 Wall. 624, 20 L. ed. 82; *Sun Mutual Ins. Co. v. Kountz Line*, 122 U. S. 583, 30 L. ed. 1137; *Somerby v. Buntin*, 118 Mass. 279; *Collins v. Butler*, 14 Cal. 223; *Newell v. Humphrey*, 37 Vt. 265.

one partner, but paid for by the firm, is the property of the firm, although there may be no declaration or memorandum in writing disclosing the trust, and signed by the partner to whom the land has been conveyed (*e*). So, if shares in a company are bought with partnership money, they will be partnership property, although they may be standing in the books of the company in the name of one partner only, and although it may be contrary to the company's deed of settlement for more than one person to hold shares in it (*f*).¹

Ships.—As regards ships there was often a difficulty arising from the ship registration acts. For as it was clearly settled that a ship belonged, both at law and in equity, to the person or persons who were registered as her owners, and to no one else, it followed that if a ship had been bought with partnership money, had been used as partnership property, and had always been treated as such by all the partners, yet if she was registered in the name of one partner only, there was no method by which that one could be prevented from effectually asserting an exclusive right to the ship, and depriving his co-partners of all their interest in her (*g*). The provisions of the present Merchant shipping acts differ, however, in several material respects from the enactments previously in force; and now, in the case above supposed, the registered partner would be deemed a trustee for the firm (*h*).

(*e*) *Forster v. Hale*, 5 Ves. 308, and 3 ib. 696.

(*f*) *Ex parte Connell*, 3 Deac. 201; *Ex parte Hinds*, 3 De G. & S. 613.

(*g*) See *Slater v. Willis*, 1 Beav. 354; *Battersby v. Smyth*, 3 Madd. 110; *Camden v. Anderson*, 5 T. R. 709; *Curtis v. Perry*, 6 Ves. 739; *Ex parte Yallop*, 15 Ves. 60; *Ex parte Houghton*, 17 Ves. 251; and as to the old law relating to equitable interests in ships, see an article by the author in the *Law Magazine* for May, 1862 (vol. xiv. p. 70, N. S.). If a ship was registered in the name of two partners, the shares in which

they were interested might have been shown. See *Ex parte Jones*, 4 M. & S. 450. As to the right of one partner to sell or mortgage a ship belonging to the firm, see *Ex parte Howden*, 2 M. D. & D. 574.

(*h*) 17 & 18 Vict. c. 104, §§ 37 and 43, and 25 and 26 Vict. c. 63, § 3. Upon the construction of the former act, see *Hughes v. Sutherland*, 7 Q. B. D. 160; *Liverpool Borough Bank v. Turner*, 1 J. & H. 159, and 2 De G. F. & J. 502. A ship may be registered in the name of a company, though some of its members are foreigners. See 17 & 18 Vict. c. 104, § 18; and *R. v. Arnaud*, 9 Q. B. 806.

¹ The property of a firm belongs to the firm, and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts and a settlement of the account between the partners.

Where two agree to engage in milling business as partners, the one to erect

[*325] * **Cases where property paid for by the firm does not belong to it.**—Strong as is the presumption that what is bought with partnership money is partnership property, the presumption may be rebutted; *e.g.* by showing that the money was lent by the firm to one partner, and so was not in fact partnership money when invested (*i*). Moreover, it is to be observed that property which has been used and treated as partnership property cannot be presumed to belong to one partner only, simply because he paid for it; for the presumption in such a case is rather that the property in question was his contribution to the common stock (*j*). This subject will be adverted to more at length in the next section.

Secret benefits obtained by one partner.—It has already been seen that one partner will not be allowed to retain for his own exclusive benefit any property which he may have acquired in breach of that good faith which ought to regulate the conduct of partners *inter se*. Whatever property has been so acquired, will be treated as obtained for the benefit

(*i*) As in *Smith v. Smith*, 5 Ves. 193. See, also, *Walton v. Butler*, 29 Beav. 428; *Ex parte Emly*, 1 Rose, 64.

(*j*) See *Ex parte Hare*, 1 Deac. 25, *per* Sir J. Cross.

a building on a lot which he owns, and convey a half interest to the other, and the other to furnish the machinery, in all of which they are to be equal owners, and the former subsequently conveys an undivided half interest to a third, but dies without conveying to his partner as agreed, his widow has dower in the half of the lot not conveyed, but no interest in the building or other improvements, and the heirs take no interest in either of the lots or improvements. *Grissom v. Moore*, 106 Ind. 296; s. c. 55 Am. Rep. 742.

The several contributions were thus brought into the firm as stock, or firm property, *id.* See also *Huston v. McNeil*, 41 Ind. 504; *Clark's Appeal*, 72 Penn. St. 142; *Hiscock v. Phelps*, 49 N. Y. 97; *Person v. Wilson*, 25 Minn. 189.

Improvements on lands even owned by one partner, if made with partnership funds, are to be treated as the personal property of the firm. *Grissom v. Moore*, *supra*; *Lane v. Tyler*, 49 Me. 252; *Averill v. Loucks*, 6 Barb. 19; see *Goodburn v. Stevens*, 5 Gill. 1.

When the same persons carry on the same business as partners in two different places, and under different firm names, there is in law but one partnership, and the assets of both nominal firms are equally applicable to the payment of all the creditors. *Campbell v. Colorado Coal & Iron Co.*, 9 Colo. 60.

In *Scott v. McKinney*, 98 Mass. 344, one of two persons, by agreement, at an auction sale, bid off goods in his own name, and afterwards sold them in his own name. The other, together with an undisclosed partner, maintained an action against the purchaser for half the price, the purchaser having consented to sever the payment. See *Vetter v. Lentzinger*, 31 Iowa, 182; *Thursby v. Lidgerwood*, 69 N. Y. 199; *Conklin v. Leeds*, 58 Ill. 178; *Remington v. Allen*, 109 Mass. 47; *Morton v. Ostrom*, 33 Barb. 256; *Rogers v. Nichols*, 20 Tex. 719; *Elliot v. Stevens*, 38 N. H. 311; *Crabtree v. Clapham*, 72 Me. 473.

of all the partners, and as being part of the assets of the firm ; and this rule applies to property obtained by a continuing or surviving partner in breach of the good faith which he is bound to exercise towards a retired partner, and the representatives of a deceased partner, so long as their interest in the partnership assets continues (*k*).

Money paid to one partner for his exclusive benefit.— At the same time, if an advantage which has been obtained by a partner is wholly unconnected with the partnership affairs, or, being connected with them, has been conferred upon him with a view to his own personal benefit, he cannot be called upon to account for it to the partnership. For example, where a ship, belonging to a Frenchman and two Americans as partners, was captured by a British cruiser, and compensation was made to the Americans, but to them only, the Frenchman being expressly excluded, it was held that the sum awarded to the Americans belonged to them alone, and that the Frenchman had no interest in it (*l*). So, if one partner is * the lessee of property to which the [*326] firm is only entitled so long as the partnership continues, and on the dissolution of the partnership the lease is sold or renewed, the price of the sold lease, or the renewed lease, as the case may be, will belong, not to the firm, but to that partner in whom the lease is by hypothesis exclusively vested (*m*).

Property acquired after dissolution.— As regards property acquired after a dissolution, but before the affairs of a dissolved partnership have been wound up, such property is not necessarily to be considered as partnership property, even though the partner acquiring it has continued to carry on the business of the dissolved firm without the consent of his late partners.¹ This was decided in *Nerot v. Burnand* (*n*). In that case, in effect, an hotel-keeper bequeathed his business to his son and daughter. After the death of the

(*k*) See *ante*, p. 305 *et seq.*

(*m*) See *Burdon v. Barkus*, 3 Giff.

(*l*) *Campbell v. Mullett*, 2 Swanst. 551. See, also, *Burnand v. Rodocanachi*, 7 App. Ca. 333; *Thompson v. Ryan*, 2 Swanst. 565, *n.*; *Moffatt v. Farquharson*, 2 Bro. C. C. 338. See the note on this case in Belt's edition of Brown's Reports.

412, aff. on appeal, 4 De G. F. & J. 42.

(*n*) 4 Russ. 247, and 2 Bli. N. S. 215. See, too, *Payne v. Hornby*, 25 Beav. 280.

¹ Stern's Appeal, 95 Penn. St. 504; *Jones v. Walker*, 103 U. S. 444, 26 L. ed. 404.

testator, the daughter continued to carry on the business. She afterwards transferred it to a new house in Clifford Street, and this house was conveyed to her in fee. She continued to carry on the business there for some time, and ultimately she married. During the greater part of the time which had elapsed since the death of the testator, his son had been abroad, and on his return he insisted that he ought to be considered as a partner with his sister, and that as such he was entitled to have the new house taken by her, and all the stock in trade and effects purchased by her in order to carry on the business, treated as partnership property. The Vice-Chancellor decided that the testator's son and daughter had become partners, but that the partnership between them had been dissolved on her marriage. He also held, that the new house, and all the goods, furniture, plates, linen, china, wines, stock in trade, implements and other effects, being in and about the premises, formed a part of the partnership property. Upon appeal this decision was affirmed, so far as it related to the existence and subsequent dissolution of partnership; but was varied so far as it related to what ought to be considered as partnership property. [*327] *Upon this head the Lord Chancellor's judgment was as follows:—

“It appears to me satisfactorily made out from all the circumstances that the house in Clifford Street was bought with the partnership property; bought, in the first instance, partly with the partnership property, partly with money borrowed by Miss Nerot and afterwards repaid out of the partnership effects, and partly upon the credit of the house that belonged to the partnership, and I think that part of the Vice-Chancellor's decree by which he directs the house to be sold, must be affirmed.

“There is a part of the decree, however, in which I cannot concur. The dissolution of the partnership took place in September, 1819. The Vice-Chancellor has directed all the property to be sold which was in the house in Clifford Street at the time when the decree was pronounced, several years after the dissolution of the partnership, as if all the property which at the time of the decree existed in the house was, without inquiry, to be considered as partnership property. Lord Eldon doubted greatly whether that part of the decree could be sustained; and in my opinion it must be varied by directing the Master to take an account of the particulars of the partnership property which were in the house in Clifford Street at the time of the dissolution, and of the value of the property at that time; and to enquire whether any part of that property still remains in the house (o).

(o) See, also, *Ex parte Morley*, 8 Ch. 1026, where a surviving partner continued the business, sold the old stock in trade, and it was held that the new stock in trade formed part of his separate estate.

Goodwill.—The goodwill of a partnership, in so far as it has a pecuniary value, is partnership property, unless the contrary can be shown. This subject, however, will be more conveniently discussed hereafter, when treating of partnership articles (*p*).

SECTION II.—SEPARATE ESTATE.

2. **Property of the individual partners.**—The preceding enquiry into what constitutes the property of the firm, has rendered it unnecessary to enquire at length into what constitutes the separate property of its members. A few additional observations, pointing out the danger of relying too much on circumstances which are often regarded as decisive, may, however, be usefully added.

* **That which produces partnership profits may belong** [*328] **to one partner only.**—It by no means follows that persons who are partners by virtue of their participation in profits, are entitled as such to that which produces those profits. For example, coach-proprietors who horse a coach and divide the profits, may each make use of horses which belong to himself alone and not to the firm of proprietors (*q*).¹ So, where a merchant employs a broker to buy goods for him and to sell them again on his account, although it may be agreed that the profits are to be divided, the goods themselves, and the money arising from their sale, are the property of the merchant, and not the joint property of himself and the broker (*r*); and it not unfrequently happens that dormant partners have no interest in anything except the profits accruing to the firm to which they belong (*s*).

Property used for partnership purposes not necessarily partnership property.—Again, it by no means follows that prop-

(*p*) See *infra*, book iii. ch. 9, § 2.

(*q*) As in *Fromont v. Coupland*, 2 Bing. 170; *Barton v. Hanson*, 2 Taunt. 49, and see *Wilson v. Whitehead*, 10 M. & W. 503, as to an author's interest in paper supplied for his work to the publisher.

(*r*) *Smith v. Watson*, 2 B. & C. 401; *Meyer v. Sharp*, 5 Taunt. 74; *Burnell v. Hunt*, 5 Jur. 650, Q. B.

(*s*) See *Ex parte Hamper*, 17 Ves. 404, 405; *Ex parte Chuck*, Mont. 373.

¹ See, *contra*, *Sun Mutual Ins. Co. v. Kountz Line*, 122 U. S. 583, 30 L. ed. 1137; *Elliot v. Stevens*, 38 N. H. 311.

erty used by all the partners for partnership purposes, is partnership property. For example, the house and land in and upon which the partnership business is carried on, often belongs to one of the partners only, either subject to a lease to the firm, or without any lease at all (*t*). So it sometimes happens, though less frequently, that office furniture (*u*), and even utensils in trade (*x*), are the separate property of one of the partners, subject to the right of the others to use them as long as the partnership continues. If, however, a partner brings such property into the common stock [*329] as part of his capital it becomes *partnership property, and any increase in its value will belong to the firm (*y*).

Property bought with the money of the firm.—It does not even necessarily follow that property bought with the money of the firm is the property of the firm. For it sometimes happens that property, although paid for by the firm, has been, in fact, bought for one partner exclusively, and that he has become debtor to the firm for the purchase-money (*z*).¹

Agreement of the partners the true test.—It is obvious,

(*t*) See *Burdon v. Barkus*, 3 Giff. 412, aff. on appeal, 4 De G. F. & J. 42, as to a lease of a coal mine; *Ex parte Murton*, 1 M. D. & D. 252; *Balmain v. Shore*, 9 Ves. 500; *Rowley v. Adams*, 7 Beav. 548; *Doe v. Miles*, 1 Stark. 181, and 4 Camp. 373. If there is no lease and the firm is dissolved, the owner can eject his late partners without notice to quit. *Doe v. Bluck*, 8 C. & P. 464; *Benham v. Gray*, 5 C. B. 138 (an action of trespass). As to an injunction in such cases, see *Elliot v. Brown*, 3

Swanst. 489, *n.*; *Hawkins v. Hawkins*, 4 Jur. N. S. 1044, V.-C. Stuart.

(*u*) *Ex parte Owen*, 4 De G. & Sm. 351. See *Ex parte Hare*, 1 Deac. 16; *Ex parte Murton*, 1 M. D. & D. 252.

(*x*) *Ex parte Smith*, 3 Madd. 63.

(*y*) *Robinson v. Ashton*, 20 Eq. 25.

(*z*) See *Smith v. Smith*, 5 Ves. 193; *Walton v. Butler*, 29 Beav. 428; *Ex parte Emly*, 1 Rose, 64. Compare the case of the Bank of England, 3 De G. F. & J. 645, noticed *infra*, p. 330.

¹ In *Richards v. Manson*, 101 Mass. 482, plaintiff, a creditor of the separate estate of F., sought to compel the assignee in insolvency of the joint and separate estate of F., and his co-partner Y. to appropriate the net proceeds of certain real estate towards the payment of the separate debts of F., in whose name the title stood. Though it was conceded that the money paid towards the purchase was largely drawn from the partnership funds, and F. was largely indebted to the firm, it was held that in the absence of bad faith there was no implied trust in favor of the partnership.

In *Gordon v. Gordon*, 49 Mich. 501, three persons in partnership in farming carried on business on a farm owned by two of them, with a right in the third to become owner of one-third when he had paid one-third of the cost of the farm. In a suit for account between them it was held that it was not partnership property until such payment of one-third of the cost. See also *Reno v. Crane*, 2 Blackf. 217; *Snyder v. Lunsford*, 9 W. Va. 223.

therefore, that the only true method of determining as between the partners themselves what belongs to the firm, and what not, is to ascertain what agreement has been come to upon the subject. If there is no express agreement, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with. The following cases, in which there was very little evidence to show what agreement had been made, may be usefully referred to on this subject.

Stock in trade and furniture. — In *Ex parte Owen* (a) one Bowers, who was a grocer, provision dealer, and wine merchant, and who possessed stock in trade and household furniture at his place of business, took two partners, without any agreement except that they were to participate in the profits of the concern. They brought in no capital and paid no premium, and no deed or agreement was executed. Bowers bought with his own money, but in the name of the firm, new stock required for the business. Upon the bankruptcy of the firm, the question arose to whom the stock in trade and furniture belonged. The Court, coming to the best conclusion it could from such materials as were before it, held that there was an agreement between the three, expressed or implied, that all the stock in trade should become the property of the three, subject to an account, in * which the partnership would be debited in favour [*330] of Bowers for the value of the articles which belonged to him or for which he paid. But the Court thought there was not the same ground for such an inference as to the household furniture, and that therefore was held to have continued and to remain the separate estate of Bowers.

Outlays on property. — Sometimes a firm lays out money on property which belongs exclusively to one partner; or some of the partners lay out their own monies on the property of the firm; and in such cases the question arises whether the money laid out can be considered as a charge on the property on which it has been expended, or whether the owners of the property obtain the benefit of the outlay. The agree-

(a) 4 De G. & Sm. 351. See, also, *Pilling v. Pilling*, 3 De G. J. & S. 162. As to a lease of saltworks belonging originally to one partner, but which

became the property of the firm, *Parker v. Hills*, 5 Jur. N. S. 809, and on appeal, 7 ib. 833.

ment of the partners, if it can be ascertained, determines their rights in such cases. But where, as often happens, it is extremely difficult, if not impossible, to ascertain what was agreed, the only guide is that afforded by the burden of proof. It is for those claiming an allowance in respect of the outlay to establish their claim. On the other hand an intention to make a present of a permanent improvement is not to be presumed.

Houses built on partnership property. — In *Re Streatfield, Lawrence, & Company (b)*, two partners bought an estate with partnership money. The land was conveyed to them in undivided moieties to uses to bar dower, and each partner built a house on the land with money of the firm, but charged to him in his private account. An account was opened in the partnership books, and in this account the purchased estate was debited with all monies of the partnership expended in the purchase. At the time of the purchase the land was in lease, but the tenant surrendered to the partners those portions which they wanted, they reducing his rent. The rents, viz., both that paid by the tenant for what he held, and that paid to him for what he gave up, were treated in the books of the firm as paid to and by it. There was evidence to show that the partners intended to come to some arrangement respecting the division of the estate, [*331] but *they became bankrupt before doing so. It was held that both the land and the houses on it were the joint property of the firm, and not the separate properties of the partners.

Appointments. — In *Collins v. Jackson (c)*, two persons were in partnership as solicitors, and one of them held several appointments: he was clerk to poor law guardians, superintendent registrar of births, marriages, and deaths, treasurer of a turnpike trust, steward of a manor, treasurer of a charity, and receiver of tithes. The question arose whether the profits of these offices belonged to the partnership or not. There was no written agreement specifically applying to

(b) Bank of England case, 3 De G. F. & J. 645. In *Pawsey v. Armstrong*, 18 Ch. D. 698, an enquiry was directed as to buildings paid for out of partnership monies, but erected on the separate property of one of

the partners. See, also, *Burdon v. Barkus*, 3 Giff. 412, and 4 De G. F. & J. 42, where a pit was sunk by the firm in a partner's property.

(c) 31 Beav. 645.

these offices, but there was a memorandum relating to some others reserved by the father of one of the partners when he retired from business, and the Master of the Rolls held that all the offices in question were to be treated as held on behalf of both partners, and not for the exclusive benefit of the partner who actually filled the offices (*d*).

Cases where co-owners share profits.—The cases, however, which present most difficulty, are those in which the co-owners are partners in the profits derived from their common property (*e*). Suppose, for example, that two or more joint tenants, or tenants in common, of a farm or a mine, work their common property together as partners, contributing to the expenses and sharing all profits and losses equally, there will certainly be a partnership; and yet, unless there is something more in the case, it seems that the land will not be partnership property, but will belong to the partners as co-owners, just as if they were not partners at all (*f*): and the result may even be the same if they purchase out of their profits other lands for the purpose of more conveniently developing their business (*g*).

Land acquired by devise farmed in common.—In *Morris v. Barrett* (*h*) lands were devised to two persons *as joint tenants. They farmed those lands to- [*332] gether for twenty years, and kept their money in one common stock to which each had access, but they never came to any account with each other. Out of their common stock they bought other lands, which were conveyed to one of them only, but were farmed by both, like the first lands. It was held that the devised farms were not partnership property, but that the purchased farms were.

Joint tenants by devise partners in profits.—In *Brown v. Oakshot* (*i*) a brewer devised his real estate to trustees for a term of 500 years, upon trust, to pay certain annuities, and

(*d*) See, also, *Smith v. Mules*, 9 Ha. 556; and *Ambler v. Bolton*, 14 Eq. 427, as to the mode of dealing with such offices on a dissolution.

(*e*) As to the distinction between co-ownership and partnership, see *ante*, p. 51 *et seq.*

(*f*) See *Crawshay v. Maule*, 1 Swanst. 523; and *Roberts v. Eberhardt*, Kay, 159. See, also, *Williams v. Williams*, 2 Ch. 294, where the

partnership had expired, but an agreement to divide the property was held to have been come to.

(*g*) *Steward v. Blakeway*, 4 Ch. 603, and 6 Eq. 479, a case of a farm and quarry. But compare *Morris v. Barrett*, *Phillips v. Phillips*, and *Waterer v. Waterer*, cited below.

(*h*) 3 Y. & J. 384. Compare *Waterer v. Waterer*, *infra*, p. 333.

(*i*) 24 Beav. 254.

to divide the surplus rents between his sons, and he devised the same estates subject to this term to his sons as joint tenants. The sons carried on their father's business in partnership together, and used the real estate devised to them for the purposes of the business; but it was nevertheless held that the reversion in fee continued to be vested in them jointly, and not in common, as would have been the case had it become partnership property.

Public-houses devised to partners in a brewery. — In *Phillips v. Phillips* (*k*) public-houses were devised to two persons who carried on a brewery in partnership, and it was held that such houses did not become partnership property, though used for the purposes of the partnership. In the same case some mortgage debts secured on public-houses were bequeathed to the two partners, and they afterwards purchased the equities of redemption, and paid for them out of the funds of the partnership, but it was held that the property thus acquired did not form part of the partnership property, the equities of redemption following the mortgage debts. But in this very case it was held that other public-houses purchased by the partners out of the partnership funds, and used for the purposes of its trade, did form partnership property to all intents and purposes (*l*).

Devisees of a trade and of land for the purpose of carrying it on. — On the other hand, in *Jackson v. Jackson* (*m*), [*333] a testator had *devised to his two sons jointly, his trading business and lands used by him for the purpose of carrying it on. The sons took the business and carried it on in partnership; and it was held that the lands formed part of the partnership property, and did not belong to the sons as mere joint tenants. In this case, not only was there some evidence to show that the sons considered the land as part of their property as partners, but there was also this peculiarity, that a trading business was left to them, and that the land was accessory to that trade; so that it was

(*k*) As stated in *Bisset on Partnership*, p. 50. The report in 1 M. & K. 649, is silent as to the property devised. Mr. Bisset considers the decision as an authority on the point of conversion. But if, as he represents, the Court came to the conclusion that the devised property was

not in fact partnership property, the question of conversion would not arise. Compare *Waterer v. Waterer*, 15 Eq. 402, *infra*.

(*l*) 1 M. & K. 649.

(*m*) 9 Ves. 591, and 7 ib. 535. Compare this with *Brown v. Oakshot*, 24 Beav. 254, noticed *supra*.

very difficult, as observed by the Lord Chancellor, to sever the profits from the land and to hold the devisees to be partners as to the former, but not as to the latter.

Devisees of mines.— Upon this last ground it was held in *Crawshay v. Maule* (*n*), that mines devised to several persons for the express purpose of being worked by them in partnership, and which were worked accordingly, were partnership property.

Devise of nursery grounds.— In *Waterer v. Waterer* (*o*), a nurseryman who carried on business with his sons, although not in partnership, left his residuary estate, including the goodwill of his business, to his sons in common; they, after his death, carried on the business in partnership, and bought more land for the purposes of the business, and paid for it out of his estate; then one son died, and the others bought his share and paid for it out of money raised by mortgage of the nursery ground, and out of their father's estate. On the death of one of the surviving sons intestate, it was held that all the land thus acquired had become partnership property, and that the share of such son was to be treated as personal and not as real estate.¹

Land acquired for the purposes of trade.— By a slight extension of the same principle, if several persons take a lease of a colliery, in order to work the colliery as partners, and they do so work it, the lease will be partnership property (*p*). So, if co-owners of land form a partnership, and the land is merely accessory to their trade, and is treated as part of the common stock of the firm, the land will be partnership property (*q*).

* **Result of foregoing cases.**— Upon the whole, therefore, it seems that land acquired, whether gratuitously or not, for the purpose of carrying on a partnership business, and used for that purpose, is to be considered as property of the partnership; but that land which is not so acquired, but which, belonging to several persons jointly or in common, is employed by them for their common profit,

(*n*) 1 Swanst. 495.

(*o*) *Waterer v. Waterer*, 15 Eq. 402. See, also, *Davies v. Games*, 12 Ch. D. 813, a similar case.

(*p*) *Faraday v. Wightwick*, Taml.

250, and 1 R. & M. 45. See *Bentley v. Bates*, 4 Y. & C. Ex. 182.

(*q*) *Essex v. Essex*, 20 Beav. 442. Compare *Steward v. Blakeway*, 4 Ch. 603, and 6 Eq. 479.

¹ See *contra*, *Cameron v. Cameron*, 1 N. Zea. App. 24; *Ware v. Aitken*, 2 W. & W. Eq. 152 (Victoria).

does not become partnership property unless there is some evidence to show that it has been treated by them as ancillary to the partnership business, and as part of the common stock of the firm (*r*).

SECTION III.—CONVERSION OF JOINT ESTATE INTO SEPARATE ESTATE, AND *VICE VERSA*.

3. **Agreement sufficient to alter the ownership of property.**—It is competent for partners by agreement amongst themselves to convert that which was partnership property into the separate property of an individual partner, or *vice versa* (*s*). And the nature of the property may be thus altered by any agreement to that effect; for neither a deed nor even a writing is absolutely necessary (*t*); but so long as the agreement is dependent on an unperformed condition, so long will the ownership of the property remain unchanged (*u*).

Creditors not entitled to be consulted.—Moreover, as the ordinary creditors of an individual have no lien on his property, and cannot prevent him from disposing of it as he pleases, so the ordinary creditors of a firm have no lien on the property of the firm so as to be able to prevent it from parting with that property to whomsoever it [*335] chooses. Accordingly it has frequently been held, that agreements come to between partners converting the property of the firm into the separate estate of one or more of its members, and *vice versa*, are, unless fraudulent, binding not only as between the partners themselves, but

(*r*) See *Steward v. Blakeway*, 4 Ch. 693, and 6 Eq. 479, and cases *ante*, p. 332.

(*s*) *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 ib. 3; *Ex parte Fell*, 10 ib. 348; *Ex parte Rowlandson*, 1 Rose, 416.

(*t*) See *Pilling v. Pilling*, 3 De G. J. & Sm. 162; *Ex parte Williams*, 11 Ves. 3; *Ex parte Clarkson*, 4 D. & C. 56, *per* Sir G. Rose; *Ex parte Owen*, 4 De G. & Sm. 351. None of

these cases, however, turned on the effect of an unwritten agreement relating to land. See, as to a transfer by a partner of his shares in the partnership property when it consists wholly or in part of land, *post*, ch. 5, § 5.

(*u*) *Ex parte Wheeler*, Buck, 25; *Ex parte Cooper*, 1 M. D. & D. 358; *Hawkins v. Hawkins*, 4 Jur. N. S. 1044.

also on their joint and on their respective several creditors; and that, in the event of bankruptcy, the trustees must give effect to such agreements (x).¹

A conversion of joint into separate property, or *vice versâ*, most frequently takes place when a firm and one of its partners carry on distinct trades; or when a change occurs in a firm by the retirement of some or one of its members, or by the introduction of a new partner.

Dealings between one partner and the firm.—When a firm and one of its members carry on distinct trades, property passing in the ordinary way of business from the partner to the firm, ceases to be his and becomes the property of the partnership, and *vice versâ*, just as if he were a stranger to the firm. This was settled in the great case of *Bolton v. Puller* (y), in which there were two banking firms, one carrying on business at Liverpool and one in London. All the partners in the latter firm were partners in the former. Some bills of exchange came in the ordinary course of business into the hands of the Liverpool firm, to be placed to the general account of its customers. These bills were remitted by the Liverpool firm to the London firm, to be placed to the credit of the former in the general account between the two houses. Both houses afterwards becoming bankrupt, it was held that the bills were the property of the London firm and not of the Liverpool firm, or of its customers. Lord C. J. Eyre, in delivering judgment, adverted to the question now under consideration in the following terms:—

“There can be no doubt that as between themselves a partnership may have transactions with an individual partner or with two or more of the partners having their separate estate engaged in some joint concern in which the general partnership is not interested; and that they may by *their acts convert the joint property of the general [*336] partnership into the separate property of an individual partner, or into the joint property of two or more partners, or *è converso*. And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner

(x) See *Ex parte Ruffin*, and the other cases cited in the last two notes, and *Campbell v. Mullett*, 2 Swaust. 575; *Ex parte Clarkson*, 4

D. & Ch. 56; *Ex parte Peake*, 1 Madd. 358.

(y) 1 Bos. & P. 539.

¹ *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 30 L. ed. 971.

as if the partnership were transacting business with strangers: for instance, suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership."

Change of property on change of firm.—Where a change occurs in a firm by the retirement of one or more of its members, nothing is more common than for the partners to agree that those who continue the business shall take the property of the old firm and pay its debts, or that part of the property of the old firm shall become the property of those by whom its business is to be continued, whilst the rest of the property shall be otherwise dealt with. So, again, when a partnership is first formed, or when a new partner is taken into an existing firm, or when two firms amalgamate into one, some agreement is generally come to by which what was before the property of some one or more only of the members of the firm, becomes the joint property of all such members. All such agreements, if *bonâ fide*, and not fraudulent against creditors, are valid, and have the effect of altering the equitable ownership in the property affected by them (z).

In *Ex parte* Ruffin (a), which is the leading case on this subject, Thomas Cooper, a brewer, took James Cooper into partnership. That partnership was afterwards dissolved by articles, by which the buildings, premises, stock in trade, debts, and effects were assigned to James by Thomas, who retired. James afterwards became bankrupt, and some of the partnership debts being unpaid, an attempt was made to have what had been the property of the partnership applied in liquidation of those debts. But it was held that [*337] such property was no *longer the joint property of the two partners, but had been converted into the separate property of James.

Ex parte Williams (b) was a similar case, only that on the

(z) Such an agreement is not a breach of a covenant not to assign without the consent of the lessor. See *Corporation of Bristol v. Westcott*, 12 Ch. D. 461; *Varley v. Coppard*, L. R. 7 C. P. 505.

(a) 6 Ves. 119. See, too, *Ex parte* Walker, 4 De G. F. & J. 509; *Ex*

parte Sprague, 4 De G. M. & G. 866; *Ex parte* Clarkson, 4 D. & Ch. 56; *Ex parte* Gurney, 2 M. D. & D. 541; *Ex parte* Peake, 1 Madd. 346, *Ex parte* Fell, 10 Ves. 348.

(b) 11 Ves. 3. Compare *Ex parte* Cooper, 1 M. D. & D. 358.

dissolution no assignment was made. There was not even any written agreement showing the terms on which the dissolution took place. But it was sworn that the partner who continued the business was to take all the stock and effects of the old firm; and it was held that they had become his separate property, and could not be considered as the joint property of the dissolved partnership.

These decisions have always been regarded as settling the law upon the subject of conversion of partnership property, and have been constantly followed. They were not, it will be observed, decided with reference to the doctrine of reputed ownership, but with reference only to the real agreement come to between the partners. They apply as much to cases of a change of interest on death as on retirement (*c*).

The case of *Ex parte* Owen (*d*), which has been already referred to (*e*), shows that similar principles must be applied in order to determine what, on the formation of a partnership, has been converted from separate into joint estate (*f*).

Agreement must be executed.—In order, however, that an agreement may have the effect of converting joint into separate estate, or *vice versâ*, the agreement must be executed, and not be executory merely. In *Ex parte* Wheeler (*g*), a retiring partner and a continuing partner entered into an agreement in writing, by which the retiring *part- [*338] ner assigned the stock, goodwill, lease, furniture, fixtures, books, and debts of the firm, to the continuing partner, and the latter agreed to pay certain debts of the partnership for which his father, he said, would be security. The father, however, refused to give any security, and this further act was necessary to be done in order to complete the transfer of the property. The continuing partner having become bank-

(*c*) See *Re* Simpson, 9 Ch. 572; and compare *Ex parte* Morley, 8 Ch. 1026, and *Ex parte* The Manchester Bank, 12 Ch. D. 917, and 13 ib. 465. These three cases turned on the construction of the partnership articles, combined in the last two with the wills of the deceased partners. The wills and the articles together prevented a conversion.

(*d*) 4 De G. & Sm. 351.

(*e*) *Ante*, p. 329.

(*f*) See, too, *Ex parte* Barrow, 2

Rose, 252; and *Belcher v. Sikes*, 8 B. & C. 185, for a case where separate estate was made joint by a deed of dissolution not clearly expressed.

(*g*) Buck. 25. See, too, *Ex parte* Wood, 10 Ch. D. 554; *Ex parte* Cooper, 1 M. D. & D. 358; and the case of the Bank of England, 3 De G. F. & J. 645, noticed *ante*, p. 330; and compare *Ex parte* Gibson, 2 Mont. & Ayr. 4; *Ex parte* Sprague, 4 De G. M. & G. 866; *Hawkins v. Hawkins*, 4 Jur. N. S. 1044.

rupt, the court held that the property of the old firm had not been converted into the separate estate of the continuing partner, the agreement being still executory when the bankruptcy occurred.

Effect of fraud.—Moreover, an agreement which can be successfully impeached for fraud, will not affect the property to which it may relate (*h*); and it must not be forgotten, that in the event of bankruptcy, the trustee, as representing the creditors, may be able to impeach as fraudulent against them, agreements by which the bankrupt himself would have been bound (*i*). In a case where both the partnership and the individual partners were insolvent, an agreement by one of them transferring his interest to the others, and thereby converting what was joint estate into the separate estate of the transferee, was held invalid; for, although no fraud may have been intended, the necessary effect of the arrangement was to delay and defeat the joint creditors (*k*). The firm became bankrupt shortly after the assignment was made.

(*h*) *Ex parte* Rowlandson, 1 Rose, 416.

(*i*) See *Re Kemptner*, 8 Eq. 286; *Anderson v. Maltby*, 2 Ves. J. 244; *Billiter v. Young*, 6 E. & B. 40.

(*k*) *Ex parte* Mayou, 4 D. G. J. &

S. 664; *Ex parte* Walker, 4 De G. F. & J. 509. See, also, *Luff v. Horner*, 3 Fos. & Fin. 480, which seems to have been a clear case of fraud upon a creditor.

* CHAPTER V.

[*339]

OF SHARES IN PARTNERSHIPS.

Subject of present chapter.—In the present chapter it is proposed to examine the following subjects:—

§ 1. The nature of a share in a partnership, and the rules which govern its devolution in case of death.

§ 2. The amount of each partner's share.

§ 3. The lien which each partner has on the joint property, and on the shares of his co-partners.

§ 4. The mode in which a share is taken in execution for the separate debts of its owner.

§ 5. The transfer of shares.

SECTION I.—OF THE NATURE OF A SHARE, AND THE RULES WHICH GOVERN ITS DEVOLUTION IN CASE OF DEATH.

Nature of a share in a firm.—In the absence of a special agreement to that effect, all the members of an ordinary partnership are interested in the whole of the partnership property: but it is not quite clear whether they are interested therein as tenants in common, or as joint tenants without benefit of survivorship, if indeed there is any difference between the two. It follows from this community of interest, that no partner has a right to take any portion of the partnership property, and to say that it is his exclusively (*a*). No partner has any such right, either during the existence of the partnership or after it has been dissolved.

Share a right to money.—What is meant by the *share* of a partner is his proportion of the partnership assets after they have been all realized and converted into money, and

(*a*) *Lingen v. Simpson*, 1 Sim. & 55; and see the cases cited in the *Stu.* 600; *Cockle v. Whiting*, *Taml.* next note.

all the debts and liabilities have been paid and discharged (*b*).¹ This it is, and this only, which *on the death of a partner passes to his representatives, or to a legatee of his share (*c*); which under the old law was considered as *bona notabilia* (*d*); which on his bankruptcy passes to his trustee (*e*); and which the sheriff can dispose of under a *fi. fa.* issued at the suit of a separate creditor (*f*), or under an extent at the suit of the Crown (*g*). It is however to be observed that the Crown never holds jointly or in common with its subjects (*h*). Consequently, if a partner is outlawed, whereby his interest in the partnership is forfeited, the other partners lose their interests also; the Crown first taking the share of the delinquent partner, and then by its prerogative excluding the other partners with whom it would otherwise be a tenant in common. It need hardly be said that this prerogative is not enforced in modern times (*i*).

Of the doctrine of non-survivorship between partners.

Jus accrescendi, &c.—It is an old and well-established maxim, that *Jus accrescendi inter mercatores locum non*

(*b*) See *Doddington v. Hallet*, 1 Ves. S. 498-9; *Croft v. Pike*, 3 P. W. 180; *West v. Skip*, 1 Ves. S. 242; *Taylor v. Fields*, 4 Ves. 396; *Crawshay v. Collins*, 15 Ves. 229; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Darby v. Darby*, 3 Drew. 503.

(*c*) *Farquhar v. Hadden*, 7 Ch. 1. See *infra*, book iv. ch. 3, § 3.

(*d*) *Ekins v. Brown*, 1 Spinks, Ecc. & Adm. Rep. 400; *A.-G. v. Higgins*, 2 H. & N. 339. See, as to the locality of a share, *Re Ewing*, L. R. 6 P. D. 19.

(*e*) See the last note but two, and *Smith v. Stokes*, 1 East, 363.

(*f*) *Skipp v. Harwood*, 2 Swanst. 586; *Re Wait*, 1 Jac. & W. 605; *Johnson v. Evans*, 7 Man. & Gr. 240.

(*g*) *R. v. Sanderson*, Wightw. 50; *R. v. Rock*, 2 Price, 198; *R. v. Hodge*, 12 Ib. 537; *Spears v. The Lord Advocate*, 6 Cl. & Fin. 180.

(*h*) 2 Bl. Com. 409; *Hales v. Petit*, Plow. 257.

(*i*) See Collyer on Partn. 72. Forfeiture for felony and treason was abolished by 33 & 34 Vict. c. 23, § 1. See *ante*, p. 74.

¹ The right of an assignee of a partner is only an equity to share in the surplus, if any, of the firm's property after settlement of the partnership accounts. *Fourth Nat. Bank v. New Orleans & Carrollton R. R. Co.*, 11 Wall. 624, 20 L. ed. 82; *Succession of Pilcher*, 39 La. Ann. 362.

A creditor of a partner cannot by garnishee process attach a debt due to the firm, of which the debtor is a member. *Hawes v. Waltham*, 18 Pick. 451; *Foot v. Hunkins*, 14 Allen, 15; *Tobey v. McFarlin*, 115 Mass. 98. The only property or interest of a partner which can be applied to the payment of his private debts is the balance due to him on the adjustment of the accounts of the firm. *Tobey v. McFarlin*, *supra*. See *Commercial Bank v. Mitchell*, 58

habet (*k*). This is a common law, and not only an equitable maxim; but whilst its application in equity was subject to few, if any, exceptions (*l*), it was not at law so universally applicable as the generality of its terms might lead one to suppose.

* **Devolution of legal estate in land.** — Rule as to the [*341] equitable estate. — As regards real property and chattels real, the legal estate in them is governed by the ordinary doctrines of real property law; and, therefore, if several partners are jointly seized or possessed of land for an estate in fee, or for years, on the death of any one, the legal estate therein will devolve on the surviving partners (*m*); and they can mortgage it for partnership debts (*n*) and sell it for the purpose of winding up the affairs of the partnership (*o*).¹ But the surviving partners are, as regards

(*k*) Co. Lit. 182 a.

(*l*) In *Nelson v. Bealby*, 4 De G. F. & J. 321, affirming s. c. 30 Beav. 472. articles of partnership provided that on the death of A. his executors should receive one-half of the assets from B.; but they were silent as to what was to be done on the death of B. It was, however, held that his

executors were entitled to half the assets from A.

(*m*) *Jefferys v. Small*, 1 Vern. 217; *Elliot v. Brown*, 3 Swanst. 489, n.

(*n*) *Re Clough*, 31 Ch. D. 224, and *ante*, p. 218.

(*o*) *Shanks v. Klein*, 15 Otto, 18 (Amer.). See, also, *West of England, &c. Bank v. Murch*, 23 Ch. D. 138.

Cal. 12; *Filley v. Phelps*, 18 Conn. 294; *Smith v. Evans*, 37 Ind. 526; *Hall v. Clagett*, 48 Md. 223; *Menagh v. Whitwell*, 52 N. Y. 146; s. c. 11 Am. Rep. 683; *Jarvis v. Brooks*, 27 N. H. 37; *Moody v. Vincent*, 5 Low. Can. R. 388; *Campbell v. Peder*, 3 U. C. L. J. 68.

Defendant, a sheriff, levied an execution against G. on some gold taken out of G.'s mine by the plaintiff, who was working it under an oral agreement with G., by which plaintiff got two-thirds of the profits after paying all expenses. Plaintiff brought trover. Held, that sheriff should have sold only the execution debtor's share, leaving the purchaser to settle with plaintiff. *McDonald v. Geldert*, 3 Nova Scotia Dec. 551.

¹ In *Shanks v. Klein*, 104 U. S. 18, 26 L. ed. 635, a surviving partner, under pressure from creditors of the firm, conveyed all the property of the firm to a trustee for the creditors, with remainder, if any, to the use of the partners and their heirs or devisees. The conveyance included large quantities of real estate. The deceased partner had devised all his estate to his executor under various trusts. The grantee from the surviving partner brought suit to compel the executor to convey to him the legal title of the deceased partner which vested in him under the will, and the court decreed the conveyance and held that the equitable title vested in plaintiff by the conveyance from the surviving partner.

An administrator of a partner may bring a bill in equity to settle the partnership affairs without making the heir at law of the deceased partner a party. *Moore v. Huntington*, 17 Wall. 417, 21 L. ed. 642, and note; *Jones v. Hardesty*, 10 G. & J. 404 (Md.).

Surviving partner takes firm property as trustee for the creditors of the

the interest of the deceased partner, deemed to be trustees thereof for the persons entitled to his estate, and are compellable to account with them accordingly (*p*). This, however, is only the case on the assumption that the property in question is partnership property, and forms part of the common stock in which the deceased had an interest as a partner (*q*).

Devolution of choses in action. — As regards choses in action, the right to sue for a debt owing to the firm, as well as the liability to be sued for a debt owing by it, also, at law, devolved, in the event of the death of one partner, upon

(*p*) *Jefferys v. Small*, 1 Vern. 217; *Lake v. Craddock*, 3 P. W. 158; *Lake v. Gibson*, 1 Eq. Ca. Ab. 290; *Eliot v. Brown*, 3 Swanst. 489, n.; *Lyster v. Dolland*, 1 Ves. J. 435; *Jackson v. Jackson*, 9 Ves. 596, 597. See, also, *Re Ryan*, L. R. Ir. 3 Eq. 222, where the title of persons claiming under a deceased partner prevailed against a mortgagee of the surviving partner; the mortgagee be-

ing for his separate debt, and the mortgagee having notice of the equitable interest. As to part of the property there was no such notice, and as to that the mortgagee's title prevailed.

(*q*) *Morris v. Barrett*, 3 Y. & J. 384; *Reilly v. Walsh*, 11 Ir. Eq. 22. A case of a lease acquired for the purpose of a partnership which was never formed. See *ante*, p. 331.

firm and representative of the deceased partner. *Murray v. Murray*, 5 Johns. Ch. 60; *Case v. Abeel*, 1 Paige, 293; *Marlett v. Jackman*, 3 Allen, 287.

He may free real estate from incumbrances and carry out firm contracts as to same, and control it till firm affairs are settled. *Shearer v. Shearer*, 98 Mass. 107; *Cobble v. Tomlinson*, 50 Ind. 550.

But cannot purchase the partnership property. *Nelson v. Hayner*, 66 Ill. 487; *Renfrew v. Pearce*, 68 Ill. 125.

Surviving partners have exclusive right to management, control, and possession of property and business of firm for the purpose of closing it up as soon as they can without sacrifice. *Gleason v. White*, 34 Cal. 258; *Loeschigk v. Addison*, 19 Abb. Pr. 169; *Evans v. Evans*, 9 Paige, 178; *Gannett v. Cunningham*, 34 Me. 56; *Peters v. Davis*, 7 Mass. 256; *Miller v. Jones*, 39 Ill. 54; *Andrews v. Brown*, 21 Ala. 437.

If profits are made by continuing the business to wind it up, he must account for them. *Washburn v. Goodman*, 17 Pick. 519; *Waring v. Cram*, 1 Pars. Sel. Eq. Cas. 516 (Penn.).

If articles of partnership fix duties of survivor, he will be bound by them. *Suydam v. Owen*, 14 Gray, 195.

He may make valid assignments of partnership effects for the benefit of creditors. *White v. Union Ins. Co.*, 1 Nott & McC. 556; s. c. 9 Am. Dec. 726.

Must account to representatives of deceased partner for his share of partnership funds. *Dyer v. Clark*, 5 Met. 502; s. c. 39 Am. Dec. 697.

Without special agreement is not entitled to compensation for services in closing up or continuing business. *Ames v. Downing*, 1 Bradf. 321; *Patton v. Calhoun*, 4 Gratt. 138; *Beatty v. Wray*, 19 Penn. St. 516; *Brown v. McFarland*, 41 Penn. St. 129.

Contra, *Griggs v. Clark*, 23 Cal. 427; *Hite v. Hite*, 1 B. Mon. 177.

Compensation for extra services. *Schenkl v. Dana*, 118 Mass. 236; *Newell v. Humphrey*, 37 Vt. 265.

the surviving partner exclusively (*r*). In equity, * however, the legal personal representatives of a de- [*342] ceased partner were entitled to have a debt due to the partnership brought into account by the surviving partners (*s*), and were liable to be proceeded against by a creditor of the firm (*t*). The Judicature Acts have not materially altered the law in this respect (*u*).

Devolution of ordinary chattels.—As regards ordinary chattels, it was held in *Buckley v. Barber* (*v*), that the interest of a deceased partner in chattels belonging to the firm did not devolve upon the surviving partners, so as to enable them to give a good legal title to the chattels as against the executors of the deceased; and that consequently such chattels might be seised under a *fi. fa.* issued on a judgment obtained against the executors by a separate creditor of the deceased partner (*x*).¹

(*r*) *Kemp v. Andrews*, Carth. 170; *Dixon v. Hammond*, 2 B. & A. 310; *Martin v. Crompe*, 1 Lord Raymond, 340, and 2 Salk. 344; and see *Slipper v. Stidstone*, 5 T. R., 493; *French v. Andrade*, 6 T. R. 582. There is indeed an old case in which an action of *assumpsit* for a partnership debt was held to be properly brought by the executors of a deceased partner, and the surviving partners jointly; *Hall v. Huffam*, alias *Hall v. Roughton*, 2 Lev. 188 and 228, and 3 Keble, 798; but this case is in direct opposition to the last cited, and is contrary to what was clearly settled before the Judicature Acts.

(*s*) The receipt of the survivors for a debt due to the firm is a good discharge to the debtor, *Brasier v. Hudson*, 9 Sim. 1; *Philips v. Philips*, 3 Ha. 281; and the surviving partner can, without making the executors of the deceased parties, sustain an action for an account against a debtor to the firm, *Haig v. Gray*, 3 De G. & Sm. 741.

(*t*) *Ante*, book ii. ch. 2, § 1.

(*u*) See *ante*, book ii. ch. 2 and 3.

(*v*) *Buckley v. Barber*, 6 Ex. 164; and see *per Dampier, J.*, in *R. v. The Collector of Customs*, 2 M. & S. 223.

(*x*) This case was certainly perplexing. It made a useless distinction between land, debts, and

Appointed receiver at his own instance, not entitled to compensation as receiver. *Berry v. Jones*, 11 Heisk. 206; s. c. 27 Am. Dec. 742.

Action will lie against representative of deceased partner after recovery of judgment against survivor and return of execution unsatisfied, notwithstanding survivor has property not discovered by sheriff. *Pope v. Cole*, 55 N. Y. 124; s. c. 14 Am. Rep. 198.

Sole survivor may transfer note payable to late firm. *Johnson v. Berlitzheimer*, 84 Ill. 54; s. c. 25 Am. Rep. 427.

¹ A sole surviving partner of an insolvent firm, who is insolvent personally, may make a valid assignment of the partnership assets for the benefit of firm's creditors, with preferences where there is no statute forbidding it. *Emerson v. Senter*, 118 U. S. 3, 30 L. ed. 49. See *Hoyt v. Sprague*, *infra*; *White v. Union Ins. Co.*, 1 Nott & McC. 556.

And a surviving partner may hold the assets of the firm in his possession until the firm debts are paid, including indebtedness to himself. *Clay v. Freeman*, 118 U. S. 97, 30 L. ed. 104.

Goodwill.—The extent to which goodwill survives will be noticed hereafter (*y*).

Before quitting the present subject, it may be observed that the doctrine of non-survivorship amongst partners is not confined to merchants nor even to traders, but extends to partners generally (*z*). But it does not apply to societies not having gain for their object, and the members of which are merely joint tenants of the property they hold (*a*).

[*343] * *Of the doctrine that shares are personal estate.*

Shares personal estate.—From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts,

ordinary chattels; it logically involved the consequence that a surviving partner could only properly sell his share of a partnership chattel; and it was inconsistent with the principles which induced courts of equity to decline (except under special circumstances) to grant a receiver at the instance of the executors of a deceased against a surviving partner. In *Taylor v. Taylor*, 7 Mar. 1873, Lord Justice James, sitting for

V.-C. Wickens, expressed his disapproval of *Buckley v. Barber*. All this is, however, of little consequence now.

(*y*) See book iii. ch. 9, § 2.

(*z*) See *Buckley v. Barber*, 6 Ex. 164; *Annand v. Honiwood*, 2 Ch. Ca. 129; *Jefferys v. Small*, 1 Vern. 217; *Lake v. Gibson*, 1 Eq. Ca. Ab. 290; *Lake v. Craddock*, 3 P. W. 158.

(*a*) As an instance, see *Brown v. Dale*, 9 Ch. D. 78.

Where the representative of a deceased partner and the beneficiaries of the estate allow the surviving partners to carry on the business without withdrawing the share of the estate, they lose their lien as against subsequent creditors of the concern. *Hoyt v. Sprague*, 13 Otto, 613, 26 L. ed. 585.

For the purpose of closing up the affairs of the firm, surviving partners have exclusive right to the management, control, and possession of the property of the firm. *Peters v. Davis*, 7 Mass. 256; *Andrews v. Brown*, 21 Ala. 437; *Evans v. Evans*, 9 Paige, 178; *Moore v. Huntington*, 17 Wall. 417, 21 L. ed. 642 and note; *Gannett v. Cunningham*, 34 Me. 56; *Gleason v. White*, 34 Cal. 258.

He must account for profits if any are made. *Washburn v. Goodman*, 17 Pick. 519; *Waring v. Cram*, 1 Pars. Sel. Eq. Cas. 522 (Penn.).

And be controlled by articles if they fix duties of survivor. *Suydam v. Owen*, 14 Gray, 195.

Is not ordinarily entitled to compensation for closing up business. *Beatty v. Wray*, 19 Penn. St. 516; *Brown v. McFarland*, 41 Penn. St. 129. *Contra*, *Hite v. Hite*, 1 B. Mon. 179; *Griggs v. Clark*, 23 Cal. 430. See also *Schenkl v. Dana*, 118 Mass. 236, and *Newell v. Humphrey*, 37 Vt. 265, where allowances were made.

Sole survivor may transfer notes payable to firm. *Johnson v. Berlzheimer*, 84 Ill. 54; s. c. 25 Am. Rep. 427.

Action will lie against representatives of deceased partner for unsatisfied judgment against survivor on firm debt, though surviving partner has undisclosed property. *Pope v. Cole*, 55 N. Y. 124; s. c. 14 Am. Rep. 198.

it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties (*b*).¹ And although the decisions

(*b*) See, as to this, *Steward v. Blakeway*, 4 Ch. 603, and 6 Eq. 479.

¹ The nature of real estate as dealt in and owned by partnerships, with the rights of each partner to bind the firm in relation to it, and of the representations of each partner in the firm real estate, forms one of the most interesting features of the law of partnerships. That partnerships may be formed to deal in real estate there are abundant authorities. *Williams v. Gillies*, 75 N. Y. 197; *Clagett v. Kilbourne*, 1 Black, 346, 17 L. ed. 213; *Porter v. Graves*, 104 U. S. 171, 26 L. ed. 691; *Thompson v. Bowman*, 6 Wall. 316, 18 L. ed. 736; *Bird v. Morrison*, 12 Wis. 152; *Foster v. Chaplin*, 19 Ont. Chy. 251; *Drifill v. Goodwin*, 23 Ont. Chy. 431; *Page v. Thomas*, 43 Ohio St. 38; s. c. 54 Am. Rep. 788 and note.

And where the firm does not deal in real estate, but acquires it in the course of business, or it is purchased with partnership funds, or for partnership purposes, it becomes partnership property though the title be in individual members of the firm, or in persons outside the firm. *Hoyt v. Sprague*, 103 U. S. 613, 26 L. ed. 585; *Hewitt v. Rankin*, 41 Iowa, 35; *Flanagan v. Shuck*, 82 Ky. 617; *Davis v. Smith*, 82 Ala. 198; *Lindley v. Davis*, 6 Mont. 453; *Fairchild v. Fairchild*, 64 N. Y. 471; *Shafer's Appeal*, 106 Penn. St. 49; *Shanks v. Klein*, 104 U. S. 18, 26 L. ed. 635; *Williams v. Shelden*, 61 Mich. 311.

A contribution to the partnership of an interest in land by one partner, the owner in possession, is good as against his heirs without deed, but does not cut off dower, which however does not attach to partnership buildings erected by the other partners on this land. *Grissom v. Moore*, 106 Ind. 296; s. c. 55 Am. Rep. 742.

Real estate purchased by a partnership with its funds, and used in its business is partnership property, though the legal title is in the names of the individual partners, and it is subject to partnership liabilities in preference to a judgment in favor of a separate creditor, although such liabilities accrued subsequent to the attaching of the judgment lien. *Page v. Thomas*, 43 Ohio St. 38; s. c. 54 Am. Rep. 788. (See full note 792 of 54 Am. Rep.)

Parol evidence is admissible to show whether land used by the firm, and in part patented to one member alone, was separate or joint property. *Newton v. Doran*, 3 Ont. Chy. 353.

Surviving partner's equitable title in lands does not require a demand of possession on part of heir of deceased partner, suing in ejectment on his ancestor's legal title. *Atkinson v. McLeod*, 8 Ont. Q. B. 344.

Shanks v. Klein, 104 U. S. 15, 26 L. ed. 635, is authority for the proposition that a surviving partner may sell real estate belonging to the partnership, and equity will compel the holder of the legal title to convey it to the purchaser. See also *Solomon v. Fitzgerald*, 7 Heisk. 552; *Murphy v. Abrams*, 50 Ala. 293; *Andrews v. Brown*, 21 Ala. 437; *Buffum v. Buffum*, 49 Me. 108.

So, too, creditors of the firm have priority over individual creditors in real estate of the firm as in the personal estate. For this purpose it is treated as personalty. *Dupuy v. Leavenworth*, 17 Cal. 262; *Messer v. Messer*, 59 N. H. 375; *Mauck v. Mauck*, 54 Ill. 281; *Bopp v. Fox*, 63 Ill. 540; *York v. Clemens*, 41 Iowa, 95.

upon this point are conflicting, the authorities which are in favour of the above conclusion certainly preponderate over the others.

Land acquired for partnership purposes is deemed to be partnership property though deeded to the partners in their individual names. The individual partner in such case holds in trust for the firm. *Paige v. Paige*, 71 Iowa, 318; s. c. 60 Am. Rep. 799; *Page v. Thomas*, 43 Ohio St. 38; s. c. 54 Am. Rep. 788 and note, 792.

The mere fact of the purchase of the real property with partnership funds, directly or indirectly, is sufficient, in the absence of anything to the contrary, to raise a presumption that the real estate is intended to be partnership property, and is in equity personalty so far as needed to pay partnership liabilities. See *Paige v. Paige*, 71 Iowa, 318; s. c. 60 Am. Rep. 799; *Collumb v. Read*, 24 N. Y. 505; *Evans v. Hawley*, 35 Iowa, 83; *Sigourney v. Munn*, 7 Conn. 11; *Allen v. Withrow*, 110 U. S. 119, 28 L. ed. 90; *Clagett v. Kilbourne*, 1 Black, 346, 17 L. ed. 213; *Forde v. Herron*, 4 Munf. 316; *Shanks v. Klein*, 104 U. S. 18, 26 L. ed. 635; *Deloney v. Hutcheson*, 2 Rand, 183; *Baird v. Baird*, 1 Dev. & Bat. Eq. 524; *Uhler v. Semple*, 20 N. J. Eq. 288; *Richardson v. Wyatt*, 2 Desau. Eq. 471; *Hunt v. Benson*, 3 Humph. 459; *Ross v. Henderson*, 77 N. C. 170; *Wooldridge v. Wilkins*, 3 How. 360 (Miss.); *Thayer v. Lane*, Walk. Ch. 200; *Bryant v. Hunter*, 6 Bush, 75; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Bopp v. Fox*, 63 Ill. 540; *Price v. Hicks*, 14 Fla. 565; *Cornwall v. Cornwall*, 6 Bush, 369; *Ludlow v. Cooper*, 4 Ohio St. 1; *King v. Weeks*, 70 N. C. 372; *Holmes v. Moon*, 7 Heisk. 506; *Clark's Appeal*, 72 Penn. St. 142; *Shafer's Appeal*, 106 id. 49.

The leading cases are *Collumb v. Read*, *supra*, and *Buchan v. Sumner*, *supra*.

Oil lands purchased for partnership purposes are to be treated as personal property. *Sanborn v. Sanborn*, 11 Ont. Chy. 359.

One of four partners in a land purchase bought the shares of two, and tried to make the fourth contribute to make up difference in money to cover loss on resale. On demurrer, the bill was dismissed. *Foster v. Chaplin*, 19 Ont. Chy. 251.

W. and R. became partners in grazing as a result of being part-owners of land, and did not become part-owners of land in order to become partners in grazing; hence the lands were to be treated as real estate, not personal property. *Ware v. Aitken*, 2 Wyatt & Webb, Eq. 152 (Victoria); see *Johnson v. Colclough*, 4 Australian J. R. 53, 131 (Victoria); *Colonial Bank v. Buckland*, 9 Victorian L. R. Eq. 29.

Where five sons inherited land and sheep thereon and bought other and used all in common for sheep-raising; held, that the devised land was real estate and the purchased land was personal property. *Cameron v. Cameron*, 1 New Zea. C. A. 24.

Partnership in land selection being illegal under statute, the administrator of one partner was precluded from claiming share in land, but might claim share of the farming partnership property on the land. *Wesbey v. Churchman*, 10 Victorian L. R. Eq. 214.

In a case of a partnership in a speculation in land it was held that the divisible profits might be ascertained either by resale or by a valuation after deducting cost and incidental expenses. *Proudfoot v. Bush*, 7 Ont. Chy. 518.

The loss on a real estate speculation was directed to be shared by the partners in same proportion as they shared profits and losses of their other business. *Storm v. Cumberland*, 18 Ont. Chy. 245.

Managing partner has power to sell or mortgage partnership lands standing in his name. *Reid v. Smith*, 2 Ont. R. Chy. D. 69; *Mason v. Parker*, 16

In *Thornton v. Dixon* (c), the Court recognised the rule that partnership property must be considered as personal

(c) 3 Bro. C. C. 199.

Ont. Chy. 230; *White v. Colonial Bank*, 2 Australian J. R.; s. c. 2 Victorian R. Eq. 96; *Glass v. Higgins*, 2 Australian J. R. 10; s. c. 2 Victorian R. Eq. 28.

It must be clearly shown that the land purchased is for partnership purposes, and with the knowledge and authority of the firm, or else the partners will not be liable on notes given for the purchase. *Fraser v. McLeod*, 8 Ont. Chy. 268.

Surviving partner can sell partnership real estate for partnership purposes, although legal title in another. His conveyance gives grantee a right in equity to compel the heirs of him who held the legal title to convey it to the purchaser. *Allen v. Withrow*, 110 U. S. 119, 28 L. ed. 90; *Andrews v. Brown*, 21 Ala. 437; *Bird v. Morrison*, 12 Wis. 138; *Ludlow v. Cooper*, 4 Ohio St. 1; *Dupuy v. Leavenworth*, 17 Cal. 262; *Murphy v. Abrams*, 50 Ala. 293; *Shanks v. Klein*, 104 U. S. 18, 26 L. ed. 635; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366.

And although sale not necessary to pay firm debts. *Solomon v. Fitzgerald*, 7 Heisk. 552; *McAlister v. Montgomery*, 3 Hayw. 94 (Tenn.).

But sale will not be ordered unless interests of all partners require it. *Pierce v. Carey*, 37 Wis. 232.

Best course is to obtain leave of court to sell. *Buffon v. Buffon*, 40 Me. 108; *Shearer v. Paine*, 12 Allen, 289.

After such a sale for partnership purpose and settlement, the surplus is real estate and goes to the heirs. *Foster's Appeal*, 74 Penn. St. 391; *Wiegand v. Copeland*, 14 Fed. Rep. 118.

The English rule so carefully stated by the author and sustained by the strong current of authorities in that country does not obtain in the United States beyond the necessity of considering realty as personalty in winding up the partnership affairs. And as between the real and personal representatives of the deceased partner, the balance not needed for the settlement of the liabilities of the partnership goes to the real representatives by devise or inheritance. And this character attaches to the proceeds as well as the realty itself. *Collumb v. Read*, 24 N. Y. 505; *Buehan v. Sumner*, 2 Barb. Ch. 165, summing up the American cases. See also *Wilcox v. Wilcox*, 13 Allen, 252; *Dyer v. Clark*, 5 Met. 562; *Foster's Appeal*, 74 Penn. St. 391; *Fairechild v. Fairechild*, *supra*; *Black v. Black*, 15 Ga. 445; *Scruggs v. Blair*, 44 Miss. 456; *McGrath v. Sinclair*, 55 Miss. 89; *Lowe v. Lowe*, 13 Bush, 688.

And a widow takes dower in her husband's share of the residue. *Smith v. Jackson*, 2 Edw. Ch. 28; *Huston v. Neil*, 41 Ind. 504; *Shearer v. Shearer*, 98 Mass. 107. And see *Grissom v. Moore*, 106 Ind. 296.

In Canada the English rule is followed. *Sanborn v. Sanborn*, 11 Ont. Chy. 359; *Wylie v. Wylie*, 4 Ont. Chy. 278.

Partnership realty descends to the heirs or devisees subject to payment of partnership debts. *Rice v. Barnard*, 20 Vt. 479; *Holland v. Fuller*, 13 Ind. 195; *Scruggs v. Blair*, 44 Miss. 406; *Gray v. Palmer*, 9 Cal. 639; *Shearer v. Shearer*, 98 Mass. 111.

One of the tests of the character of partnership real estate is the right of dower therein of widows of deceased partners, and it may be said that dower is generally postponed until the liabilities of the firm have been satisfied, when it attaches to the residue. *Grissom v. Moore*, 106 Ind. 296; s. c. 55 Am. Rep. 742; *Willett v. Brown*, 65 Mo. 138; s. c. 27 Am. Rep. 265; *Conger v. Platt*, 25 Ont. Q. B. 277; *Cobble v. Tomlinson*, 50 Ind. 550.

estate; but held that the lands which were there in question, could not be so considered, as they had been conveyed to all the partners in common, and there was no agreement for a sale.

In *Bell v. Phyn* (*d*), partners in trade purchased with the funds of the firm a share in a plantation, and kept the accounts relating to the estate in the partnership books: and it was held upon the authority of the last case, that assuming the land to have become partnership property, it ought not to be regarded as personal estate.

In *Randall v. Randall* (*e*), the partners were farmers, maltsters, and biscuit-makers. They bought land for the farming business, and it was held that as it was not acquired for the purpose of any partnership in trade, the land could not be treated as personalty.

In *Cookson v. Cookson* (*f*), a father who was seised in fee of land on which he carried on business as a bottle-manufacturer, took his son into partnership, and conveyed a share in the land to him. The land was declared by the articles of partnership to be partnership property. But on the [*344] death of the *father, it was held that his share in the land was to be treated as real estate, no sale being required for the payment of the partnership debts for any other purpose.

These are the cases which militate against the rule under discussion. The following are those which support it:—

In *Ripley v. Waterworth* (*g*), partnership land was conveyed to trustees upon trust, upon a dissolution of the partnership, to sell and pay the partnership debts, and divide the residue of the money arising from the sale amongst the partners; and it was held, upon the death of one of them, that his share in the land was personal estate, although the land was not in fact sold, and the deceased's share in it was purchased by the surviving partners under a clause enabling them so to do, and contained in the conveyance to the trustees.

In *Townshend v. Devaynes* (*h*), two persons in partnership as paper-makers, purchased paper mills for the use of the firm, and paid for them out of its funds. It was agreed

(*d*) 7 Ves. 453.

(*e*) 7 Sim. 271.

(*f*) 8 Sim. 529.

(*g*) 7 Ves. 425.

(*h*) 1 Mont. Part. note 2 A. Appx.
p. 96; see, too, 11 Sim. 498, n.

that on the death of either, the survivor should have the option of purchasing his share. One of the partners died, and his share was purchased by the survivor. It was held that the whole of the purchase-money formed part of the personal estate of the deceased, although most of the money was paid in respect of the interest of the deceased in the mills.

In *Phillips v. Phillips* (*i*), two persons in partnership as brewers purchased public-houses for the purposes of their trade, and had them conveyed to both in fee. On the death of one of them, it was held that his share in the houses was to be treated as personal estate.

Broom v. Broom (*k*) is a decision to the same effect as the last, and decided on its authority.

In *Morris v. Kearsley* (*l*), a partnership of brewers was possessed of real estate conveyed partly to the partners as tenants in common, and partly to one or more of the partners in trust *for the firm; and it was decided [*345] that the several lands, hereditaments, and premises belonging to the partnership, ought to be considered as personal estate.

In *Houghton v. Houghton* (*m*), two brothers, A. and B., were partners as soap-boilers. They purchased land for the purposes of their trade, took a conveyance to themselves as tenants in common, and mortgaged the land for the purchase-money. They then built on the land, insured the buildings, and paid the expenses and the interest on the mortgage debt out of the partnership funds. A. died intestate, and B. took another brother, C., into partnership. B. and C. paid off the mortgage, and took a reconveyance to themselves as joint tenants in fee, and expended money in building and insurance, defraying the expense, as well as providing the mortgage money, out of the funds of the partnership. On B.'s death it was held that the lands and buildings had clearly become partnership property, and that it ought, therefore, to be treated as personal estate.

In *Darby v. Darby* (*n*), two brothers embarked in joint speculations in land. Their scheme was to buy land, con-

(*i*) 1 M. & K. 649. See *ante*, p. 332, note (*k*), as to the estates which were devised, and which were held not converted into personalty.

(*k*) 3 M. & K. 443.

(*l*) 2 Y. & C. Ex. 139. The report does not state how, when, or for what purpose, the property was originally acquired.

(*m*) 11 Sim. 491.

(*n*) 3 Drew. 495.

vert it into building sites, and then sell it at a profit. This was done on several occasions, the land being generally conveyed to one of them only. On the death of that one it was held that his interest in all the land bought by both, and still unsold, was personal and not real estate.

In *Essex v. Essex* (*o*), two brothers were, under the will of their father, seised of freehold lands. They agreed to become partners as curriers and tanners for fourteen years, and to carry on their business on those lands. It was stipulated that if either died during the co-partnership term, the other should take his share in the freeholds, and that the entirety thereof, including the plant and tan-pits, should be valued at 5,000*l*. The fourteen years expired, but the partnership was continued as before. On the death of one of the partners, it was held that his share in the freeholds was to be regarded as personal estate; they having been converted by the agreement for sale.

[*346] * In *Waterer v. Waterer* (*p*), the property of a nurseryman, devised by him, with the goodwill of his business, to his sons as tenants in common, was on the death of one of them treated as personal and not as real estate.

There are also various *dicta* of Lord Eldon in favour of the broad principle that partnership property is to be regarded as personal and not as real estate (*q*).

Result of the cases.—Upon the whole, therefore, it is submitted.

1. That notwithstanding *Thornton v. Dixon*, *Bell v. Phyn*, and *Randall v. Randall*, the true rule is, as stated by the Vice-Chancellor Kindersley, in *Darby v. Darby* (*r*), “that whenever a partnership purchases real estate for the partnership purposes, and with the partnership funds, it is, as between the real and personal representatives of the partners, personal estate” (*s*).

2. That, notwithstanding *Cookson v. Cookson*, no satisfactory distinction, with reference to the question of conversion, can be drawn between land purchased with partnership monies, and land acquired in any other way, provided such

(*o*) 20 Beav. 442.

(*p*) 15 Eq. 402, noticed *ante*, p. 333.

See, also, *Murtagh v. Costello*, 7 L. R. Ir. 428.

(*q*) See the judgment of V.-C.

Kindersley, in *Darby v. Darby*, 3 Drew. 499, &c.

(*r*) 3 Drew. 536.

(*s*) See, in addition to the cases referred to above, *Holroyd v. Holroyd*, 7 W. R. 426.

land is in the proper sense of the expression an asset of the partnership (*t*).

3. That the general rule may, nevertheless, be excluded by an agreement express or implied to the effect that the land shall not be sold. The reason of the rule excludes its application in such a case (*u*).

Upon this ground it was held in a recent and difficult case, that a farm and quarry worked by co-owners in partnership, and additional lands bought by them out of their profits for the purposes of their business, were not to be treated as converted into money. The Court held that no partner could *have enforced a sale, either of the original [*347] farm and quarry or of the subsequent additions to it (*x*).

The rule only applies to partnership property.—It is well settled that the doctrine of conversion does not apply to co-owners as distinguished from co-partners; nor to property owned by persons, who, although they may be partners in profits, are only co-owners of the land which yields them. Thus, where two out of three partners were owners of land occupied by the firm, and for which the firm paid a rent, and the land was in fact kept distinct from the joint property of the three partners, it was properly held, on the death of one of the two partners to whom the rent was paid, that his interest in the land was not to be considered as personal, but as real estate (*y*). So, if land belongs to all the partners as tenants in common, but not as partners, and that land is used by them for partnership purposes, but is nevertheless intended to remain vested in them as tenants in common, and not to form part of the assets of the firm, the share of each partner will be real and not personal estate (*z*). In the case now supposed, co-owners of land are partners, but the co-ownership continues unaffected by the partnership. But it is not possible on this ground to uphold *Thornton v. Dixon*, *Bell v. Phyn*, *Randall v. Randall*, or *Cookson v. Cookson*.

(*t*) See *per* Lord Eldon in *Jackson v. Jackson*, 9 Ves. 593. "It is very difficult to make a distinction between a joint tenancy by will, by a gratuitous deed, or a purchase. The law of merchants, if it applies to one, must apply to all."

(*u*) *Steward v. Blakeway*, 4 Ch. 603, and 6 Eq. 479.

(*x*) *Ibid*.

(*y*) *Rowley v. Adams*, 7 Beav. 548; *Balmain v. Shore*, 9 Ves. 500. See, too, *Phillips v. Phillips*, *ante*, p. 332.

(*z*) *Steward v. Blakeway*, 4 Ch. 603, and 6 Eq. 479.

In each of these four cases the land had become part of the assets of the firm, or it had not; if it had, these four cases are in direct conflict with those which have been alluded to above; whilst, if it had not, they are in no less direct conflict with other cases which are authorities on the question what is and what is not property of the firm.

Doctrine of conversion has only a restricted application.—The doctrine of conversion which has just been considered, merely amounts to this, that on the death of a partner his share in the partnership property is to be treated as money and not as land. It follows, however, from this doctrine that probate duty and legacy duty are payable in respect of the share of a deceased partner in partnership real es-
[*348] tate (*a*); and a *partner's share in such estate is clearly within the Charitable Uses Act, 9 Geo. 2, c. 36 (*b*).

Qualification for vote.—Whether a partner's share in partnership real estate can give him a qualification for voting on elections of members of Parliament has been much discussed of late. It is settled that if a partner has no interest in partnership realty as distinguished from the money arising from its sale, his interest in it does not confer a qualification (*c*); but unless this is the case the equitable doctrine of conversion, which has no practical operation until his death, does not deprive him of the qualification which he would otherwise have as a joint tenant or tenant in common (*d*).

A share in a cost-book mining company is not an interest in land within the 4th section of the Statute of Frauds (*e*); nor is it goods or chattels within the 17th section (*f*).

(*a*) See, as to probate duty, *A.-G. v. Habbuck*, 13 Q. B. D. 275, and 10 ib. 488; *A.-G. v. Marquis of Ailesbury*, 12 App. Ca. 672, reversing s. c. 16 Q. B. D. 408, and restoring the judgment of the Divisional Court in 14 Q. B. D. 895; *A.-G. v. Brunning*, 8 Ho. Lo. Ca. 243; *Matson v. Swift*, 8 Beavan, 368, must be taken as now overruled, see *Lord Maenaghten's judgment*, 12 App. Ca. 696; as to legacy duty, *Forbes v. Steven*, 10 Eq. 178. *Custance v. Bradshaw*, 4 Ha. 315, is to the contrary, but it cannot now be relied upon.

(*b*) *Ashworth v. Munn*, 15 Ch. D. 363.

(*c*) *Watson v. Black*, 16 Q. B. D. 270; *Bennett v. Blain*, 15 C. B. N. S. 518; *Freeman v. Gainsford*, 18 ib. 185. See, also, *Spencer v. Harrison*, 5 C. P. D. 97; *Wadmore v. Dear*, L. R. 7 C. P. 212.

(*d*) *Baxter v. Brown*, 7 Man. & Gr. 198; *Rogers v. Harvey*, 5 C. B. N. S. 3.

(*e*) *Watson v. Spratley*, 10 Ex. 222. Compare *Vice v. Anson*, 7 B. & C. 409; *Boyce v. Green, Batty*, 608.

(*f*) *Watson v. Spratley*, 10 Ex. 222.

SECTION II.—OF THE AMOUNT OF EACH PARTNER'S SHARE.

The proportions in which the members of a firm are entitled to the property of the firm, or in other words, the amount of each partner's share in a partnership, depends upon the agreement into which the partners have entered.

Shares are prima facie equal.—In the event of a dispute between the partners as to the amount of their shares, such dispute, if it does not turn on the construction of written documents, must be decided like any other pure question of fact (*g*); and if there is no evidence *from [*349] which any satisfactory conclusion as to what was agreed can be drawn (*h*), the shares of all the partners will be adjudged equal (*i*).¹

Observations on this rule.—This rule no doubt occasionally leads to apparent injustice; but it is not easy to lay down any other rule which, under the circumstances supposed, could be fairly applied. It is sometimes suggested that the shares of partners ought to be proportionate to their contributions; but without in any way denying this, it may be asked, how is the value of each partner's contribution to be measured? Certainly not merely by the capital he may have brought into the firm. His skill, his connection, his command of the confidence and respect of others, must all be taken into account; and if it is impossible to set a money value on each partner's contribution in this respect, it is obviously impossible to determine in the manner suggested, the shares of the partners in the partnership. Nor can it be said to be unreasonable to infer, in the absence of all evidence to the contrary, that the partners themselves have agreed to consider their contributions as of equal value, although they may have brought in unequal sums of money, or be themselves unequal as regards skill, connection, or character. Whether,

(*g*) See *Peacock v. Peacock*, 16 Ves. 49; *McGregor v. Bainbridge*, 7 Ha. 164; *Binford v. Dommett*, 4 Ves. 756.

(*h*) *Stewart v. Forbes*, 1 Mac. & G. 137; *Webster v. Bray*, 7 Ha. 159;

Copland v. Toulmin, 7 Cl. & Fin. 349.

(*i*) *Robinson v. Anderson*, 20 Beav. 98, and 7 De G. M. & G. 239; *Peacock v. Peacock*, 16 Ves. 49; *Webster v. Bray*, 7 Ha. 159; *Farrar v. Beswick*, 1 M. Rob. 527.

¹ *Henry v. Bassett*, 75 Mo. 89; *Whitcomb v. Converse*, 119 Mass. 38; *Ligare v. Peacock*, 109 Ill. 94; *Griggs v. Clark*, 23 Cal. 427; *Kilpatrick v. Mackay*, 4 Victorian L. R. Eq. 28.

therefore, partners have contributed money equally or unequally, whether they are or are not on a par as regards skill, connection, or character, whether they have or have not laboured equally for the benefit of the firm, their shares will be considered as equal, unless some agreement to the contrary can be shown to have been entered into (*k*).

Meaning of equality.—When it is said that the shares of partners are *primâ facie* equal, although their capitals are unequal, what is meant is that losses of capital like other losses must be shared equally; but it is not meant [*350] that on a final settlement of accounts, *capitals contributed unequally are to be treated as one aggregate fund which ought to be divided between the partners in equal shares (*l*).

Evidence showing inequality.—An agreement for inequality may be conclusively inferred from the mode in which the partners have dealt with each other, and from the contents of the partnership books (*m*).¹ Moreover, if an agreement for inequality clearly at one time existed, no presumption of any alteration in this respect will arise from the mere fact, that some of the original members have retired. In the absence of evidence to the contrary, the inference is that the shares of the retiring members have been taken by the continuing parties in the proportions in which these last were originally interested in the concern (*n*).

Rule as to presumptive equality applies to partnerships in single transactions.—The rule that the shares of partners are equal, unless they have otherwise agreed, applies not only to persons who are partners in business generally, but also to those who are partners as regards one single matter only. Thus in *Robinson v. Anderson* (*o*), where two solicitors, not

(*k*) See the last three notes. *Peacock v. Peacock*, 2 Camp. 44, and *Sharpe v. Cummings*, 2 Dowl. & L. 504, which was apparently decided on its authority, cannot be supported. See, as to Scotch law, *Thompson v. Williamson*, 7 Bli. N. S. 432; 3 Ross, L. C. on Com. Law, 381.

(*l*) See *infra*, ch. 8, § 1, on partnership accounts.

(*m*) As in *Stewart v. Forbes*, 1 Mac. & G. 137.

(*n*) *Robley v. Brooke*, 7 Bli. N. S. 90; and see *Copland v. Toulmin*, 7 Cl. & Fin. 349.

(*o*) 20 Beav. 98, and 7 De G. M. & G. 239. See, too, *Webster v. Bray*, 7 Ha. 159, and *McGregor v. Bainbridge*, ib. 164, note; *Hauslip v. Kitton*, 8 Jur. N. S. 835, V.-C. S.

¹ See *Moore v. Trieber*, 31 Ark. 113, where partners were held bound by practice of crediting payments.

in partnership, were jointly retained to defend certain actions, and there was no satisfactory evidence to show in what proportions they were to divide their remuneration, it was held that they were entitled to share it equally, although they had been paid separately and had done unequal amounts of work. The Master of the Rolls, after observing on the importance in such cases of attending to the *onus probandi*, said :

"Now I should entertain no doubt, even if I had not been confirmed by the two cases of *Webster v. Bray*, and *McGregor v. Bainbridge*, that where two solicitors undertake a matter of business on behalf of a client, the same rule would follow in that, as in any other undertaking where two persons carry on a business jointly on behalf of themselves, or as agents of other persons. It is, in point of fact, a limited partnership for a particular sort of business. Assuming nothing to have been said as to the manner in which the profits were to be divided, it appears to me to follow as a necessary consequence of law, that they are to be divided equally between them. And, although one may do more business and have exerted himself more *than the other, yet if nothing is [*351] said upon the subject of profits, the presumption is that they are to be equally divided between them. It appears to me, that if the clients had gone to Mr. Robinson and Mr. Anderson, and said—We wish you to undertake the business for us, and thereupon Mr. Robinson and Mr. Anderson had both said, We agree to do so, and nothing had taken place between them as to the manner in which they were to be paid, the necessary consequence would have been that after payment of the costs out of pocket, the net profits made by the business would have been divisible equally between them, and that neither of them could say to the other—I have done more business than you have, and am therefore entitled to a larger share of profits. It was the duty of the party who intended that this should not be a partnership transaction, and that he should be paid for the amount of business which he did without participating in that of the other, so to express himself."

Applications of rule where one firm comprises another.—A question of some difficulty arises when a firm, say of two partners, engages in a partnership speculation with a third person not a member of that firm. Is the interest of such person in the speculation to be treated as one half, the other two persons being treated as one? or is the interest of each of the three to be treated as equal, each taking one-third? The answer to these questions must depend upon whether the two partners entered into the speculation as a firm or as two individuals. If the former, there will in substance be only two parties interested in the speculation, and the profits thereof must be divided into two equal parts; whilst if the

latter is the case, there will be three parties interested, and the profits must be divided into three equal parts (*p*).¹

SECTION III.—OF THE LIEN WHICH EACH PARTNER HAS ON THE PROPERTY OF THE FIRM, AND ON THE SHARES OF HIS CO-PARTNERS.

In order to discharge himself from the liabilities to which a person may be subject as partner, every partner has a right to have the property of the partnership applied in payment of the debts and liabilities of the firm. And in order [*352] to secure a *proper division of the surplus assets, he has a right to have whatever may be due to the firm from his co-partners, as members thereof, deducted from what would otherwise be payable to them in respect of their shares in the partnership.

Foundation of partner's lien.—In other words, each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm; and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them, as partners, to the firm (*q*).¹

Consequences of the lien.—This right, lien, *quasi-lien*, or whatever else it may be called, does not exist for any practical purpose until the affairs of the partnership have to be wound up, or the share of a partner has to be ascertained; nor has

(*p*) See *Warner v. Smith*, 1 De G. J. & S. 337, where the profits were held to be divisible into two and not three parts.

(*q*) *West v. Skip*, 1 Ves. S. 239; *Skipp v. Harwood*, 2 Swaust. 586; *Doddington v. Hallet*, 1 Ves. S. 498 and 499; *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 ib. 3; *Holderness v. Shackels*, 8 B. & C. 612. *Smith v. De Silva*, Cowp. 469, can hardly be reconciled with the other cases, but

see upon it the observations of Lord Tenterden, in 8 B. & C. 618. As to the right of a minority of partners to insist on the payment of a partnership debt out of the partnership assets, see the observations of Turner, V.-C., in *Stevens v. The South Devon Rail. Co.*, 9 Ha. 326. Any member of an ordinary firm is at liberty to pay any debt of the firm, and to charge the firm with the amount paid.

¹ *Turnipseed v. Goodwin*, 9 Ala. 372; *Conwell v. Sandidge*, 5 Dana, 210.

¹ See *Hoyt v. Sprague*, 103 U. S. 613, 26 L. ed. 585; *Clay v. Freeman*, 118 U. S. 97, 30 L. ed. 104, and see note *ante*, pp. 342, 343; *Dyer v. Clark*, 5 Met. 562; *Pennybacker v. Leary*, 65 Iowa, 220; *People v. Roy*, 3 Nebraska, 261, *Till's case*; *Hobbs v. McLean*, 117 U. S. 567, 29 L. ed. 940.

any partner a right to insist as against a judgment creditor of the firm, that he shall have recourse to the assets of the firm before seeking to obtain payment from the partners individually (*r*). But when partnership accounts have to be taken, and the shares of the partners have to be ascertained, the lien of the partners on the assets of the partnership, and on each other's shares, becomes of the greatest importance.

To what property it attaches.—Whilst the partnership lasts, the lien attaches to everything that can be considered partnership property, and is not therefore lost by the substitution of new stock in trade for old (*s*). Further, on the death or bankruptcy of a partner, his lien continues in favour of his representatives or trustees, and does not terminate until his share *has been ascertained and provided [*353] for by the other partners (*t*). But after a partnership has been dissolved, the lien is confined to what was partnership property at the time of the dissolution, and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business. In this respect the lien in question differs from the lien of a mortgagee on a varying stock-in-trade assigned to him as a security for his loan (*u*).

Lien exists only on partnership assets.—It follows from the principle on which the lien of a partner is founded, that it only extends to the property of the firm, and to the separate interest of each partner in such property. In those cases, therefore, where there is a partnership in profits only, but that which produces those profits belongs exclusively to one of the partners, the lien of the others is confined to the profits, and does not extend to that which produces them (*x*). Moreover, if two persons engage in a joint adventure, each consigning goods for sale upon the terms that each is to have the produce of his own goods, neither of them will have a lien on the goods of the other, nor on the produce of such

(*r*) See *ante*, p. 299.

(*s*) See *West v. Skip*, 1 Ves. S. 239; *Skipp v. Harwood*, 2 Swanst. 586; *Stocken v. Dawson*, 9 Beav. 239, and 17 L. J. (Ch.) 282. Compare the cases in the next note but one.

(*t*) See *Stocken v. Dawson*, 9 Beav. 239, affirmed 17 L. J. (Ch.) 282, and the cases cited in note (*s*).

(*u*) *Payne v. Hornby*, 25 Beav. 280. See, too, *Nerot v. Burnand*, 4 Russ. 247, and 2 Bli. N. S. 215, *ante*, p. 326; *Ex parte Morley*, 8 Ch. 1026. Compare the cases in the last note but one.

(*x*) See *infra*, as to the lien of co-owners.

goods, although each may have raised the money to pay for his own goods by a bill drawn on himself by the other, and ultimately dishonoured (*y*).

Lien exists as against all persons claiming a share in the assets. — The lien of each partner exists not only as against the other partners, but also against all persons claiming through them or any of them; and it is therefore available against their executors, execution creditors, and trustees in bankruptcy (*z*).¹ To hold, however, that this lien could be enforced against persons purchasing partnership property, would be in effect to prevent any sale of that property without the consent of the whole firm, and would practically stop all partnership trade. Whilst, therefore, a person who purchases a share of a partner takes that share subject to [*354] the liens of the other partners (*a*), a * person who *bonâ fide* purchases from one partner specific chattels belonging to the firm, acquires a good title to such chattels, whatever liens the other partners might have had on them prior to their sale (*b*).

In *Re Langmead's trusts* a partnership between A. and B. was dissolved. A. retired, and by deed agreed to execute an assignment to B. of the partnership assets (part of which consisted of a policy of which the partners were assignees), and B. agreed to covenant to pay the partnership debts, and indemnify A. against them. No further instrument was executed. A. died, and B. afterwards assigned the policy by way of mortgage to a person who had notice of the deed. A.'s executors were afterwards compelled to pay partnership debts, which ought to have been discharged by B. and B. became bankrupt. The policy being adversely claimed by the mortgagee, by A.'s executor, and by a purchaser from B.'s assignees, it was held that, even if A. and his executors had been entitled to pursue any portion of the partnership property in the hands of B., and to have it applied in payment of the partnership debts, yet that they had no such right as against the purchaser from B., though with notice,

(*y*) *Ex parte Gemmel*, 3 M. D. & D. 198.

(*z*) *West v. Skip*, and other cases cited, *ante*, note (*s*).

(*a*) *Cavander v. Bulteel*, 9 Ch. 79.

(*b*) See *Re Langmead's Trusts*, 20 Beav. 20, and 7 De G. M. & G. 353.

¹ *Hoyt v. Sprague*, *supra*; *Moore v. Huntington*, 17 Wall. 417, 21 L. ed. 642, and note; *Hobbs v. McLean*, 117 U. S. 567, 29 L. ed. 940.

for he was not bound to see to the application of the purchase money (*c*).

No lien on a partner's share for ordinary debts due from him to firm.—The lien of partners on the partnership property extends, as has been stated, to whatever is due to or from the firm, by or to the members thereof, as such. It does not, however, extend to debts incurred between the firm and its members, otherwise than in their character of members.¹ It has therefore been held that where a partner borrowed money from the firm for some private purpose of his own, and then became bankrupt, his assignees were entitled to his share in the partnership, ascertained without taking into account the sum due from him to the firm in respect of this loan; and that the solvent partners were driven to prove against his estate in order to obtain payment of the money lent (*d*).

* **Loss of lien.**—Further, a partner's lien on partnership property is lost by the conversion of such property into the separate property of another partner. Therefore, if on a dissolution it is agreed between the partners that the property of the firm shall be divided in specie among them, and that the debts shall be paid in some specified manner;¹ and if the property is accordingly divided, but the debts remain unpaid, the lien which each partner had on the property before its division is gone: and consequently no partner has a right to have the specific things, allotted to any other partner, brought back into the common stock, and applied in liquidation of the partnership liabilities (*e*). Upon

(*c*) *Ibid*.

(*d*) See *Ryall v. Rowles*, 1 Ves. S. 348, and 1 Atk. 165; and *Meliorucchi v. The Royal Exchange Assur. Co.*, 1 Eq. Ca. Ab. 8; and *Croft v. Pike*, 3 P. W. 180. Perhaps *Smith v. De Silva*, Cowp. 469, was decided on this

principle, as suggested by Lord Tenterden, in 8 B. & C. 618.

(*e*) *Lingen v. Simpson*, 1 Sim. & Stu. 600; and see *Re Langmead's Trusts*, 7 De G. M. & G. 353, the judgment of L. J. Turner.

¹ See *Mack v. Woodruff*, 87 Ill. 570; *Warren v. Taylor*, 60 Ala. 218; *Mumford v. Nicoll*, 20 Johns. 611.

¹ See *Giddings v. Palmer*, and *Palmer v. Giddings*, 107 Mass. 269. In these cases A. and B. set off to each other specific assets and assumed specific liabilities. A firm creditor sought to hold A. for a debt incurred by B., and A. sought in equity to reach and apply to the debt assets set off to B. Held, that A. could not enforce a trust, and that the creditor, although he knew the relation of the parties and profited by it, could recover his claim. See, also, as to manner in which lien of purchase may be lost by set-off, agreement, and waiver, *Hart v. Clark*, 54 Ala. 490; *Andrews v. Mann*, 31 Miss. 322; *Robertson v. Baker*, 11 Fla. 192; *Hapgood v. Cornwell*, 48 Ill. 64.

the same principle, if two partners consign goods for sale, and direct the consignee to carry the proceeds of the sale equally to their separate accounts without any reserve, and this is done, neither partner has any lien on the share of the other in those proceeds; although it would have been otherwise if they had remained part of the common property of the two (*f*).

No lien if partnership is illegal.—If a partnership is illegal its members have no lien upon their common property, or upon each other's shares therein (*g*); unless it be by virtue of some agreement not affected by the illegality.

Lien of co-owners.—Mere co-owners have no such lien as is enjoyed by co-partners (*h*). But a part owner of a ship has a right to have the gross freight applied in the first place in payment of the expenses incurred in earning it (*i*).

[*356] *SECTION IV.—OF THE MODE IN WHICH A SHARE IS TAKEN IN EXECUTION FOR THE SEPARATE DEBTS OF ITS OWNER.

Execution against a partner for a separate debt.—The nature of a partner's share in partnership property, and the effect of the lien noticed in the preceding sections, are well seen when a separate judgment creditor of a partner seeks to levy execution upon that partner's share in the partnership. Such a creditor has always been at liberty to execute his judgment, not only against his debtor's separate property, but also against the property of any firm in which the debtor may be a partner. This at first sight seems extremely unjust; inasmuch as it looks like taking one man's property for another man's debt; but in truth the creditor gets only what belongs

(*f*) See *Holroyd v. Griffiths*, 3 Drew. 428. In *Holderness v. Shackels*, 8 B. & C. 612, the transfer to each partner was subject to the lien, which was not therefore lost.

(*g*) See *Ewing v. Osbaldiston*, 2 M. & Cr. 88.

(*h*) *Re Leslie*, 23 Ch. D. 552; *Kay v. Johnston*, 21 Beav. 536; *ante*, book i. ch. 1, § 6.

(*i*) See *Green v. Briggs*, 6 Ha. 395; *Alexander v. Simms*, 18 Beav. 80, and 5 De G. M. & G. 57; *Lindsay v. Gibbs*, 22 Beav. 522, and 3 De G. & J. 690. See, as to the lien of the master on freight, *Bristow v. Whitmore*, 4 De G. & J. 325, reversing s. c. *Johus*. 96; *Smith v. Plummer*, 1 B. & A. 582.

to his debtor, although it must be confessed that executions of the nature in question put the debtor's partners to no small inconvenience.

In order to explain the consequences of an execution against the partnership property for a separate debt of one of the partners, it will be convenient to examine the law as it stood before the Judicature acts with reference to

1. The duty of the sheriff.
2. The position of the purchaser from him.
3. The position of the execution debtor.

The position of the execution creditor and of his debtor's co-partner will appear in the course of this examination.

The effect of the Judicature acts will then be noticed.

1. *Of the duty of the sheriff.*

1. Of the duty of the sheriff.—There has been considerable doubt as to the proper mode of levying execution against the property of a firm upon a judgment recovered against one of its members only (*k*).

Sheriff seizes the partnership property.—Before the time of Lord Mansfield it seems that the sheriff was in the habit of acting upon the supposition that each partner was entitled to an undivided share of every article belonging to the firm, without reference to the state of the partnership accounts: and in executing a *fi. fa.* against a partner for his *separate debt, the sheriff *seized the whole* of the [*357] partnership effects (or of so many of them as were requisite), and *sold the undivided share* of the judgment debtor therein (*l*).

The sheriff seized the whole of every chattel which he sold, because he could not otherwise seize the share of the execution debtor. But he did not sell the whole of what he seized, because his authority was limited by the writ to the goods and chattels of the debtor, and an undivided share can be sold though it cannot alone be seized. As stated by Lord Holt in *Heydon v. Heydon* (*m*) (where there were two part-

(*k*) *Burton v. Green*, 3 Car. & P. 306.

(*l*) See *Heydon v. Heydon*, 1 Salk. 392; *Jackey v. Butler*, 2 Ld. Raymond, 871; *Backhurst v. Clinkard*,

1 Show. (K. B.) 169; *Pope v. Haman*, Comb. 217; *Mariott v. Shaw*, Comyn, 277; *Dutton v. Morrison*, 17 Ves. 205; *Re Wait*, 1 Jac. & W. 608. (*m*) 1 Salk. 392.

ners, against one of whom a judgment had been obtained), "the sheriff must seize all because the moiety is undivided; for if he seize but a moiety and sell that, the other will have a right to a moiety of that moiety; but he must seize the whole and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner" (*n*).

Lord Mansfield's innovation. — Lord Mansfield endeavoured to introduce what at first sight appears to be a more equitable practice. In his time the sheriff seems to have seized and sold the whole of a sufficient portion of the partnership goods (instead of selling only an undivided share thereof), and then an account was directed to be taken of the judgment debtor's share of the proceeds of the sale, and that share, or a sufficient part of it, was handed over to the execution creditor (*o*). This, however, was a very imperfect mode of proceeding; for it was impossible to ascertain the share of the debtor partner in the goods seized, without taking *all* the partnership accounts, and this a court of law had no power to do.

Modern rule. — Lord Mansfield's innovation was therefore discontinued (*p*); and it was finally settled, in conformity with the older cases, that the sheriff's duty was, and [*358] it still is *to seize the whole of the partnership effects (seizable under a *fi. fa.*), or of so much of them as may be requisite, and to sell the undivided share of the debtor partner therein, without reference to the state of the accounts as between him and his co-partners (*q*).¹

(*n*) See, too, *per* Tindal, C. J., in *Johnson v. Evans*, 7 Man. & Gr. 249, 250.

(*o*) See *Eddie v. Davidson*, 2 Dougl. 650.

(*p*) See *Parker v. Pistor*, 3 Bos. & P. 288; *Chapman v. Koops*, ib. 289; *Morley v. Stromboni*, 3 Bos. & P. 254. Lord Eldon greatly disapproved of it, see *Waters v. Taylor*, 2 V. & B. 301.

(*q*) See *Helmore v. Smith*, 35 Ch. D. 436; *Holmes v. Mentze*, 4 A. &

E. 127; s. c. 5 Nev. & Man. 563, and 4 Dowl. Pr. Ca. 300; *Johnson v. Evans*, 7 Man. & Gr. 240. In *Holmes v. Mentze*, it was held that a sheriff, who for the debt of one partner executed a *fi. fa.* against the property of the firm, was not entitled to make the execution creditor and the co-partner of the debtor interplead; but that if the execution creditor denied the partnership he was bound to indemnify the sheriff.

¹ A judgment creditor against an individual member of a partnership for a separate debt or a firm debt may levy upon the interest of his judgment debtor. And this interest is in the balance or equity of the judgment debtor after satisfaction of the liabilities of the firm. *Wilson v. Strobach*, 59 Ala.

Sale of execution debtor's share. — The sheriff, having seized the property of the firm, proceeds to sell the interest of the judgment debtor in the chattels seized, and to assign the same to the purchaser (*r*). Formerly the sale had to be by auction, but now it may be by private contract (*s*).

Rights of the other partners. — It is to be observed that the sheriff seizes, sells, and assigns; but he has no business to take the goods of the firm out of the possession of the solvent partners (*t*); and if the sheriff sells not the share of the execution debtor, but the goods themselves, he is accountable to the solvent partners for so much of the proceeds of the sale as is proportional to their share in the partnership (*u*).

2. Of the position of the purchaser from the sheriff.

Of the purchaser from the sheriff. — If the purchaser is a stranger unconnected with the firm, he acquires for his own benefit all the judgment debtor's interest in the property comprised in the bill of sale, and becomes, as regards such property, tenant in common with the judgment debtor's co-partners (*x*).² The next step, therefore, is to adjust the conflicting rights of the purchaser, and these partners. Now it is clear from the nature of the lien which each partner has on the partnership property, that a partner holds a partnership chattel with his co-partner, subject to all * the equities which that co-partner has upon it (*y*), [*359] and subject therefore to his right to have all the

(*r*) See *Habershon v. Blurton*, 1 De G. & Sm. 121.

(*s*) See *Ex parte Villars*, 9 Ch. 432.

(*t*) See *per* Patteson, J., in *Burnell v. Hunt*, 5 Jur. 650, Q. B.

(*u*) *Mayhew v. Herrick*, 7 C. B. 229.

(*x*) See *Helmore v. Smith*, 35 Ch. D. 436.

(*y*) *Baker v. Goodair*, 11 Ves. 85.

488; *Daniel v. Owens*, 70 Ala. 297; *Weaver v. Ashcroft*, 50 Tex. 428; *Atwood v. Meredith*, 37 Miss. 635; *contra*, *Fogg v. Lawry*, 68 Me. 78.

Cannot be reached by garnishee process. *Bulfinch v. Winchenbach*, 3 Allen, 161; *Tobey v. McFarlin*, 115 Mass. 98. But see *Treadwell v. Brōwn*, 43 N. H. 290; *Barrett v. McKenzie*, 24 Minn. 20; *Howard v. McLaughlin*, 98 Penn. St. 440.

² The purchaser at an execution sale takes the interest of the partner whose share has been sold, that is, the tight to the surplus, if any, after the payment of the partnership debts, with the right as incident to an accounting to ascertain the amount. He takes an undivided and unascertained interest. *Wilson v. Strobach*, 59 Ala. 488; *Clagett v. Kilbourne*, 1 Black. 346, 17 L. ed. 213; *Randall v. Johnson*, 13 R. I. 338; *Cox v. Russell*, 44 Iowa, 556; *Carter v. Roland*, 53 Tex. 540.

creditors of the firm paid out of the assets of the firm, and consequently, *pro tanto*, out of the chattels seized by the sheriff (z). It is equally clear that in this respect the purchaser from the sheriff is in no better position than the partner whose undivided share has been sold (a). Before the Judicature acts, therefore, a suit in equity became necessary, in order that the partnership accounts might be taken, and the partnership property duly applied (b).

Injunction.—The right of the partners of the judgment debtor being of the nature described, and it being incompatible with that right that the partnership property seized by the sheriff should be removed or sold by him, the Court of Chancery would, before the Judicature acts, on a bill filed by the judgment debtor's co-partners against the judgment debtor and his creditor and the sheriff, direct the partnership accounts to be taken, and restrain the sheriff from selling the property and appoint a receiver (c).

3. *Of the position of the execution debtor.*

Of the execution debtor.—With respect to the execution debtor, it is to be observed that, in the first place, the execution generally (d) operates as a dissolution of the partnership (e). In the next place, the assignment by the [*360] sheriff to the purchasers transfers to the * purchaser whatever the sheriff had power to assign, and did assign, but no more; and as, under a *fi. fa.*, the sheriff may not have power to sell everything which, as between the partners, is to be considered partnership property, it by no means follows that the assignment has transferred to the creditor all the judgment debtor's share and interest in the

(z) See the next note.

(a) *Skip v. Harwood*, 2 Swanst. 586; *Taylor v. Field*, 4 Ves. 396; *Young v. Keighly*, 15 Ves. 557; *Dutton v. Morrison*, 17 Ves. 205-6; *Ex parte Hamper*, ib. 404-5; *Re Wait*, 1 J. & W. 608.

(b) See *Parker v. Pistor*, 3 Bos. & Pul. 288.

(c) See *Bevan v. Lewis*, 1 Sim. 376. As to an injunction against the sheriff, compare *Newell v. Townsend*, 6 Sim. 419, with *Garstin v. Asplin*, 1 Madd. 150, and *Jackson v. Stanhope*,

10 Jur. 676; and see Story on Partn. § 264; and as to making the sheriff a party, see Lord Eldon's obs. in *Franklyn v. Thomas*, 3 Mer. 235, and *Hawshaw v. Parkins*, 2 Swanst. 549.

(d) Not necessarily in all cases; see *Helmore v. Smith*, 35 Ch. D. 436, where the solvent partner (in effect) paid out the sheriff with partnership monies.

(e) *Aspinall v. The London & N. W. Rail. Co.*, 11 Ha. 325; *Habershon v. Blurton*, 1 De G. and Sm. 121; *Skip v. Harwood*, 2 Swanst. 587.

partnership (*f*). In a case, therefore, where a stranger purchased from the sheriff the execution debtor's interest, and then assigned it to the other partners, it was held that the execution debtor was still entitled to an account from them; the sale by the sheriff not having divested him of all his interest in the concern (*g*).

Purchase of his interest by his co-partners. — Upon a sale by the sheriff of the interest of one partner in the property seized, there is nothing to prevent a purchase of that interest by his co-partners. But the co-partners purchasing of the sheriff must act with perfect fairness. If they do anything to conceal the true value of the share, so as to enable themselves to buy it for less than it would otherwise have fetched, the sale will not be allowed to stand. In *Perens v. Johnson* (*h*), the share of a partner in a leasehold colliery was sold by the sheriff under a *fi. fa.* The sale was by auction. The other partners bought the share; the execution creditor was paid off; and a balance was handed over by the sheriff to the execution debtor. It appeared, however, that before the sale took place, it was expected that a valuable seam of coal would be reached; that the solvent partners had removed the gear so as to prevent any one going down the mine, that they had also removed some ironstone recently raised, so as to lead persons visiting the mine to believe that coal was not so nearly within reach as it was; and that a few days after the sale, and after only one day's working a rich seam of coal was actually discovered. The execution debtor thereupon filed a bill against his late co-partners, praying that the sale might be set aside, on the ground that the purchase from the sheriff was contrary to that good faith which should be observed by one partner towards another; and a decree was made in his *favour setting the [*361] sale aside upon repayment of the purchase-money, with interest at 5*l.* per cent.

Purchase with partnership monies. — Again, if the solvent partners buy the execution debtor's share in the goods seized and pay for it out of the partnership monies, they cannot

(*f*) See *Helmore v. Smith*, 35 Ch. D. 436.

(*g*) *Habershon v. Blurton*, 1 De G. & Sm. 121.

(*h*) *Perens v. Johnson*, and *Johnson v. Perens*, 3 Sm. & G. 419. See, also, *Smith v. Harrison*, 26 L. J. Ch. 412, V.-C. W., where a sale by the sheriff was also set aside.

hold the share for their own benefit and treat the execution debtor as no longer a partner or interested in the share purchased (*i*).

Right of the execution creditor. — The execution creditor has no title to goods seized under a *fi. fa.* issued by him, unless he purchases them from the sheriff. Consequently where, under a *fi. fa.* issued against one partner for a private debt, the sheriff seized the goods of the firm, which afterwards became bankrupt, and the assignees sold the goods seized, it was held that an action by the execution creditor against the assignees for money had and received to his use, would not lie; first, because *he* had no title to the goods; and secondly, because if he had, his interest in them could not be ascertained without taking the accounts of the partnership (*k*).

4. *Modifications introduced by the Judicature acts.*

The Judicature acts and rules promulgated under them do not unfortunately contain any directions applicable to the subject now under consideration. Nor has the new practice under them yet been reduced to shape. The writer can only, therefore, offer the following suggestions with reference to their combined effect:—

1. The practice must be the same in all divisions of the High Court.

2. The old practice must be adhered to so far as it is consistent with the modern procedure.

3. Some form of procedure must be adopted which shall have the effect of a suit for an account, and an injunction, and a receiver.

4. There appears to be no reason why the sheriff should not proceed to seize the partnership goods, and sell the execution debtor's share as before; and there is in strict-
[*362] ness no more * necessity for him to interplead now than before (*l*); and yet as no order for his withdrawal can be made in his absence, a proceeding by him in the nature of an interpleader summons, bringing all parties interested before the Court, would probably be the most convenient course to adopt.

(*i*) *Helmore v. Smith*, 35 Ch. D. 436, where the assignment by the sheriff was set aside.

(*k*) *Garbett v. Veale*, 5 Q. B. 408.

(*l*) See acc. W. N. 1875, p. 204.

5. Upon a seizure by the sheriff the partners of the execution debtor should obtain an order dissolving the partnership, directing the sheriff to withdraw, and directing the accounts of the partnership to be taken, and the value of the execution debtor's interest in the property seized by the sheriff to be ascertained, and appointing a receiver.

6. After the accounts have been taken, and the above value ascertained, the receiver should be directed to pay the amount of such value to the purchaser from the sheriff, if any, and the rest of the share of the execution debtor in the assets of the partnership to him. If the share has not been sold the execution creditor must be paid out of, or to the extent of the above value. The receiver can then be discharged.

7. Whether all this can be done without a transfer to the Chancery Division is not clear; but probably it very often may be done; and practically a sale by the sheriff will probably be frequently dispensed with. A sale usually produces great hardship, as the value of the share sold is unknown; and its sale seldom answers any useful purpose except that of getting rid of the sheriff.

Suggested alteration of the law.—The truth, however, is that the whole of this branch of the laws is in a most unsatisfactory condition, and requires to be put on an entirely new footing. The statutory enactments relating to charging orders should be extended to all cases in which the share of a partner is sought to be taken in execution for a separate debt of his own.¹

* SECTION V.—OF THE TRANSFER OF SHARES. [*363]

Transfer of shares.—When persons enter into a contract of partnership, their intention ordinarily is, that a partnership shall exist between themselves and themselves alone. The mutual confidence reposed by each in the other is one of the main elements in the contract, and it is obvious that persons may be willing enough to trust each other, and yet be unwilling to place the same trust in any one else.

¹ See a suggested form of order in Seton on Decrees, 1214, n. (ed. 4), referred to in Whetham v. Davey, 30 Ch. D. 579.

Hence it is one of the fundamental principles of partnership law that no person can be introduced as a partner without the consent of all those who for the time being are members of the firm. If, therefore, a partner dies, his executors or devisees have no right to insist on being admitted into partnership with the surviving partners, unless some agreement to that effect has been entered into by them (*m*).

Effect of transfer. — Still less can a partner by assigning his share entitle his assignee to take his place in the partnership against the will of the other members (*n*).

Effect of assignment. — The assignment, however, is by no means inoperative: on the contrary, it involves several important consequences, more especially as regards the dissolution of the firm and the right of the assignee to an account (*o*).¹

1. **As regards dissolution.** — As regards dissolution, it is remarkable that there should be so little authority to be found. It is generally stated, that if a member of an ordinary partnership transfers his share, he thereby dissolves the partnership; but this proposition requires qualification. The true doctrine, it is submitted, is that if the partnership is at will, the assignment dissolves it (*p*); and if the partnership is not at will, the other members are entitled to treat the assignment as a cause of dissolution. It can hardly be that a partner, who has himself no right to dissolve or to introduce a new partner, can, by assigning his share, confer on the assignee a right to have the accounts [*364] of the firm *taken, and the affairs thereof wound up, in order that he may obtain the benefit of his assignment.

(*m*) *Pearce v. Chamberlain*, 2 Ves. S. 33; *Crawford v. Hamilton*, 3 Madd. 254; *Bray v. Fromont*, 6 ib. 5; *Crawshay v. Maule*, 1 Swanst. 495; *Tatam v. Williams*, 3 Ha. 347.

(*n*) See *Jefferys v. Smith*, 3 Russ. 158.

(*o*) In *Marshall v. Maclure*, 10 App. Ca. 325, a surrender of a partner's share in property mortgaged was held, under special circumstances, to include the firm's share.

(*p*) See *Heath v. Sansom*, 4 B. & Ad. 172.

¹ The right of an assignee or purchaser substitutes the grantee to the interests of the selling partner without the rights of membership. He may dissolve the firm and have an account to determine his interest by the purchase. *Clagett v. Kilbourn*, 1 Black. 346, 17 L. ed. 213; *Miller v. Brigham*, 50 Cal. 615; *Fellows v. Greenleaf*, 43 N. H. 421; *Fourth National Bank v. New Orleans & Carrollton R. R. Co.*, 11 Wall. 624, 20 L. ed. 82.

2. **As regards account.**—Although a partner cannot, by transferring his share, force a new partner on the other members of the firm without their consent, there is nothing to prevent a partner from assigning or mortgaging his share without consulting his co-partners; and if a partner does assign or mortgage his share, he thereby confers upon the assignee or mortgagee a right to payment of what, upon taking the accounts of the partnership, may be due to the assignor or mortgagor (*q*).¹ But the assignee or mortgagee acquires no other right than this (*r*); and he takes subject to the rights of the other partners; and will be affected by equities arising between the assignor and his co-partners subsequently to the assignment (*s*).² Even if the assignee gives notice of the assignment, he cannot (if the partnership is for a term) acquire a right to the assignor's share as it stands at the time of the assignment or notice, discharged from subsequently arising claims of the other partners (*t*). The assignment cannot deprive them of their right to continue the partnership, and consequently to bring subsequent dealings and transactions into account. It seems, however, that an assignee of a share in a partnership can compel the other partners to come to an account with him (*u*); but

(*q*) *Whetham v. Davey*, 30 Ch. D. 574; *Glyn v. Hood*, 1 Giff. 328, and 1 De G. F. & J. 334. See, also, *Cassels v. Stewart*, 6 App. Ca. 73.

(*r*) *Smith v. Parkes*, 16 Beav. 115.

(*s*) See *Cavander v. Bulteel*, 9 Ch. 78; *Lindsay v. Gibbs*, 3 De G. & J. 690; *Guion v. Trask*, 1 De G. F. & J. 379, *per* Turner, L. J. See, also, *Re Knapman*, 18 Ch. D. 300; *Bergmann v. McMillan*, 17 ib. 423; *Morris v. Livie*, 1 Y. & C. C. 380.

(*t*) See *Bergmann v. McMillan*, 17 Ch. D. 423; *Cavander v. Bulteel*, 9 Ch. 78; *Kelly v. Hutton*, 3 Ch. 703; *Redmayne v. Forster*, 2 Eq. 467.

(*u*) See *Whetham v. Davey*, 30 Ch. D. 574; *Glyn v. Hood* and *Kelly v. Hutton*, *ubi supra*. But *Kelly v. Hutton* appears to have been a case of co-ownership in the newspaper and a partnership in its profits.

¹ *Fourth National Bank v. New Orleans and Carrollton R. R. Co.*, 11 Wall. 624, 20 L. ed. 821.

² A chattel mortgage given by a new firm to secure a *bonâ fide* indebtedness of the old partnership, or of an individual member of the old firm, is not therefore fraudulent against creditors of the new firm. *Fisher v. Syfers*, 109 Ind. 514.

Where debts are owing by a partner, the mere preference of individual over partnership creditors by the execution of a chattel mortgage, in the firm name, or by authority of the partners upon the firm property, is not of itself such a fraud as will authorize the setting aside of the chattel mortgage at the suit of a creditor. *Fisher v. Syfers*, *supra*; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46; *In re Kahley*, 2 Biss. 383; *Jones*, Chat. Mort. sec. 44.

the analogy furnished by sub-partnerships leads to the inference that the assignee must, to use Lord Eldon's language, be satisfied with the share of the profits arising and given to the assignor (*x*).

Transfer allowed by agreement. — If partners choose [*365] to agree that any of them shall be at *liberty to introduce any other person into the partnership, there is no reason why they should not; nor why, having so agreed, they should not be bound by the agreement (*y*). Persons who enter into such an agreement consent prospectively and once for all to admit into partnership any person who is willing to take advantage of their agreement, and to observe those stipulations, if any, which may be made conditions of his admission. Such an agreement as this is the basis of every partnership the shares in which are transferable from one person to another. Those who form such partnerships, and those who join them after they are formed, assent to become partners with any one who is willing to comply with certain conditions (*z*).

As observed in *Lovegrove v. Nelson* (*a*), "To make a person a partner with two others their consent must clearly be had, but there is no particular mode or time required for giving that consent; and if three enter into partnership by a contract which provides that on one retiring, one of the remaining two, or even a fourth person who is no partner at all, shall name the successor to take the share of the one retiring, it is clear that this would be a valid contract which the Court must perform, and that the new partner would come in as entirely by the consent of the other two as if they had adopted him by name."

Effect of transfer where there is a right to assign. — Where a partner has an unconditional right to transfer his share, he may transfer it to a pauper, and thus get rid of all liability as between himself and his co-partners in respect of transactions subsequent to the transfer and notice thereof given to them (*b*). But even in this case the transfer alone does not render the transferee a member of the partnership, and liable

(*x*) See *ante*, p. 48; and *Brown v. De Tastet*, Jac. 284, where the bill was dismissed against the other partners.

(*y*) *Lovegrove v. Nelson*, 3 M. & K. 20.

(*z*) See *Fox v. Clifton*, 9 Bing. 119.

(*a*) 3 M. & K. 1.

(*b*) *Jefferys v. Smith*, 3 Russ. 158.

as between himself and the other members to any of the debts of the firm (*c*). In order to render him a partner with the other members, they must acknowledge him to be a partner, or permit him to act as such (*d*).

Effect on continuity of firm.—As an ordinary partnership is not distinguishable from the persons composing it, and as every change amongst those *persons creates [*366] a new partnership, it follows that every time a partner transfers his stock to a non-partner the continuity of the firm is broken. In this respect such companies as are not mere partnerships on a large scale differ from ordinary firms, their continuance not being interrupted by changes amongst their members (*e*).

Mining partnerships.—An apparent exception to the rule that a share in a partnership cannot be transferred without the consent of all the partners exists in the case of mining partnerships. Mines are a peculiar species of property, and are in some respects governed by the doctrines of real property law, and in others by the doctrines which regulate trading concerns. Regarding them as real property, and their owners as joint tenants or tenants in common, each partner is held to be at liberty to dispose of his interest in the land without consulting his co-owners;¹ and a transfer of this interest confers upon the transferee all the rights of a part-owner, including a right to an account against the other owners (*f*). But even here, if the persons originally interested in the mine are not only part-owners but also partners, a transferee of the share of one of them, although he would become a part-owner with the others, would not become a partner with them in the proper sense of the word, unless by agreement express or tacit (*g*).

Ships.—Similar observations apply to transfers of shares in ships.

(*c*) Ibid.

(*d*) Ibid.

(*e*) See *Mayhew's case*, 5 De G. M. & G. 837.

(*f*) See *Bentley v. Bates*, 4 Y. &

C. Ex. 182; *Redmayne v. Forster*, 2 Eq. 467.

(*g*) As in *Jefferys v. Smith*, 3 Russ. 158; *Crawshay v. Maule*, 1 Swanst. 518.

¹ *Bissell v. Foss*, 114 U. S. 252, 29 L. ed. 126. No *delectus personæ*, *Duryea v. Burt*, 28 Cal. 569; *Settembre v. Putnam*, 30 Cal. 490; *Taylor v. Castle*, 42 Cal. 367; *Kahn v. Smelting Co.*, 102 U. S. 641, 26 L. ed. 266.

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*CHAPTER VI.

OF CONTRIBUTION AND INDEMNITY WITH REFERENCE
TO PARTNERSHIPS.

Subject of present chapter. — In this chapter it is proposed to consider the nature of those expenses and losses which, as between the members of a firm, are chargeable to the firm, and also the nature of those which are properly chargeable against some one or more of the members exclusively of the others. In other words, it is proposed to investigate the principles upon which, in taking the accounts of a firm, a given expense or loss is to be placed to the debit of the firm, or to the debit of one or more of its members separately.

In connection with this subject it must always be borne in mind that every member of an ordinary firm is, to a certain extent, both a principal and an agent. He is liable as a principal to the debts and engagements of the firm, and in respect of them he is entitled to contribution from his co-partners; for they have no right to throw on him alone the burden of obligations which, *ex hypothesi*, are theirs as much as his (*a*). Again, each member as an agent of the firm is entitled to be indemnified by the firm against losses and expenses *bonâ fide* incurred by him for the benefit of the firm, whilst pursuing the authority conferred upon him by the agreement entered into between himself and his co-partners. On the other hand, a partner has no right to charge the firm with losses or expenses incurred by his own negligence or want of skill, or in disregard of the authority reposed in him (*b*).

The above general principles are the basis of the whole of this branch of partnership law; but in order to apply [*368] them *correctly to the infinite variety of circumstances which occur in the ordinary course of life, it

(*a*) See Robinson's case, 6 De G. M. & G. 572; Spottiswoode's case, *ib.* 345; Lefroy v. Gore, 1 Jo. & Lat. 571. (b) Thomas v. Atherton, 10 Ch. D. 185; Bury v. Allen, 1 Coll. 604.

will be convenient to notice the leading doctrines on the subject of contribution and indemnity generally, and then to allude more particularly to the rights of partners with respect to compensation for trouble; outlays and advances; debts, liabilities, and losses and interest.

SECTION I.—GENERAL OBSERVATIONS.

Foundation of the right to contribution.

The right of contribution.—Whether a person who has suffered loss is entitled to be indemnified wholly or partly by others, is a question which cannot be decided in the negative merely upon the ground that no agreement for contribution or indemnity has been entered into. An agreement may undoubtedly give rise to a right to indemnity or contribution; but the absence of an agreement giving rise to such a right, is by no means fatal to its existence. The general principle which prescribes equality of burden and of benefit, is amply sufficient to create a right of contribution in many cases in which it is impossible to found it upon any genuine contract, express or tacit. The common feature of such cases is, that one person has sustained some loss which would have fallen upon others as well as upon himself, but which has been averted from them at his expense; for example, where one tenant in common repairs the common property, and so saves it from destruction (*c*); where one of several sureties pays a debt for which all are liable (*d*); where one person has his goods thrown overboard in order to save the ship and the rest of its cargo (*e*). In all these cases a right of contribution arises; not by virtue of any contract, but because the safety of some cannot justly be purchased at the expense of others; and all must therefore contribute to the loss sustained (*f*).¹

(*c*) *Ante*, p. 60.

(*d*) *Dering v. Winchelsea*, 1 Cox, 318.

(*e*) *Abbott on Shipping*, part iv. ch. 10; and part vi. ch. 1, ed. 12.

(*f*) *Lefroy v. Gore*, 1 Jo. & Lat. 571; *Spottiswoode's case*, 6 De G. M. & G. 345; *Ashurst v. Mason*, 20 Eq. 225, a case of co-directors. See, too, the cases in 1 Eq. Ca. Ab. Contribu-

¹ No action at law during the partnership for moneys paid on its account; but in equity one partner may sue his co-partners and recover in contribution.

[*369] * Again, where one man's goods have been lawfully seized for the debt of another, the owner of the goods has a right to redeem them and to be indemnified by the debtor (*g*).

tion and Average, and in the note to *(g)* *Edmunds v. Wallingford*, 14 Averall *v.* Wade, Ll. & Gould (temp. Q. B. D. 811. Sug.), 264.

Myrick v. Dame, 9 Cush. 248; *Duff v. Maguire*, 99 Mass. 300; *Dodd v. Tarr*, 116 id. 287; *Whitman v. Porter*, 107 id. 522; *Remington v. Allen*, 109 id. 47; *Ryder v. Wilcox*, 103 id. 24; *Williams v. Henshaw*, 11 Pick. 79; *Fanning v. Chadwick*, 3 id. 420; *Capen v. Barrows*, 1 Gray, 376; *White v. Harlow*, 5 Gray, 463; *Downs v. Jackson*, 33 Ill. 464; *Dakin v. Graves*, 48 N. H. 45; *Pico v. Cuyas*, 47 Cal. 174; *Fletcher v. Brown*, 7 Humph. 385; *Mickle v. Peet*, 43 Conn. 65; *Noel v. Bowman*, 2 Litt. 46; *Cook v. Jenkins*, 35 Ga. 113; *Johnson v. Wilson*, 54 Ill. 419; *Hodgson v. Baldwin*, 65 Ill. 532; *Buckmaster v. Gowen*, 81 id. 153; *Olleman v. Reagan*, 28 Ind. 109; *Hinkle v. Reid*, 43 Ind. 390; *Vanness v. Dubois*, 64 id. 338; *Dale v. Thomas*, 67 id. 570; *Clouch v. Moyer*, 23 Kan. 404; *Ganger v. Pautz*, 45 Wis. 449; *Maginnis v. Crosby*, 11 La. Ann. 400; *Sewell v. Cooper*, 21 id. 582; *Conrad v. Callery*, 22 id. 428; *Stanton v. Buckner*, 24 id. 391; *Radovich v. Frigerio*, 27 id. 68; *Seelye v. Taylor*, 32 id. 1115; *Evans v. Clapp*, 123 Mass. 165; *Farrar v. Pearson*, 59 Me. 561; *Wright v. Troop*, 70 id. 346; *Wheeler v. Arnold*, 30 Mich. 304; *Foulks v. Rhodes*, 12 Nev. 225; *Savage v. Putnam*, 32 N. Y. 501; *Kelly v. Kauffman*, 18 Penn. St. 351; *Grubb v. Cottrell*, 62 id. 23; *Klase v. Bright*, 71 id. 186; *Scott's Appeal*, 88 id. 173; *Fessler v. Hickernell*, 82 id. 150; *Forbes v. Webster*, 2 Vt. 58; *Hobbs v. Wilson*, 1 W. Va. 50.

Where a partnership consisting of two persons was formed for a single transaction in real estate, and no questions were involved in regard to the rights of creditors, and money was advanced by one partner, it was held that assumpsit could be maintained to enforce contribution by the other partner of his share. *Finlay v. Stewart*, 56 Penn. St. 183; *Meason v. Kaine*, 63 id. 335; *Cleveland v. Farrar*, 4 Brew. 27.

So where there was an express promise by one partner to pay another a compensation for personal attention to the firm's business. *Paine v. Thacher*, 25 Wend. 450.

Where one partner converted the whole capital to his own use, actions at law for contribution were sustained. *Reis v. Hellman*, 25 Ohio St. 180.

And where there is but one unadjusted item. *Farwell v. Tyler*, 5 Iowa, 535; *Purvins v. Champion*, 67 Ill. 459; *Whetstone v. Shaw*, 70 Mo. 575.

Where one partner pays judgment rendered against the firm on its debt, he cannot keep the judgment alive and enforce it against his co-partners, either in his own name or that of a third person to whom he may cause it to be assigned, unless perhaps under special circumstances disclosing some equity entitling him to hold it as security to the extent of the sum which may be found due to him from his co-partners on an accounting. *Booth v. Farmers' & Mech. N. Bk. of Rochester*, 74 N. Y. 228 affirming 11 Hun, 258; *Hinton v. Odenheimer*, 4 Jones Eq. 406.

One partner paid a judgment against the firm and took execution against his co-partner for half. The partnership accounts being unsettled it was held under 26 Vict. c. 45, § 4, execution was improperly issued, and it was set aside. *Scripture v. Gordon*, 7 Ont. P. R. 164.

The remedy of a partner who, after dissolution, has paid a judgment against the firm and seeks contribution is not by an action of debt but by an

Exclusion of right by agreement. — But although a right to contribution may exist where there is no contract upon which it can be founded, it cannot exist if excluded by agreement; and it is so excluded whenever those who would otherwise be contributories have entered into any contract, express or tacit, amongst themselves, which is inconsistent with a right on the part of one to demand contribution from the others (*h*). This is too obvious to require comment, but it must be borne in mind as qualifying the common saying that the right to contribution is independent of agreement.

Exclusion of right by fraud. — Again, a right to contribution may be excluded by fraud, as is the case where a person induces another by false and fraudulent representations to join him in partnership. In such a case the person defrauded has a right to rescind the contract of partnership, and, as between himself and co-partner, to throw all the partnership losses upon the latter alone (*i*).

(*h*) As in *Gillan v. Morrison*, 1 De G. & S. 421; *Re The Worcester Corn Exchange Co.*, 3 De G. M. & G. 180.

(*i*) See *Newbigging v. Adam*, 34 Ch. D. 582; *Pillans v. Harkness*,

Colles, 442; *Rawlins v. Wickham*, 1 Giff. 355, and 3 De G. & J. 304, noticed hereafter under the head Rescission of Contract. See, too, *Carew's case*, 7 De G. M. & G. 43.

action *pro socio*. *Lydon v. Casey*, 13 Quebec L. 237. But see *Sells v. Hubbell*, 2 Johns. Ch. 394.

But when the partnership is dissolved and the accounting had and balance struck, *assumpsit* will lie. Or where only one item is in dispute. *Lockwood v. Bates*, 1 Del. Ch. 435; *Whetstone v. Shaw*, 70 Mo. 575; *Fanning v. Chadwick*, 3 Pick. 420; *Garven v. Allan*, 3 Ont. Chy. 238; *McColl v. Oliver*, 1 Stew. 510; *Maguire v. Brady*, 1 Rev. de Leg. 367, Quebec Law Dig. 927; *Robinson v. Reiffenstein*, id. 352, Quebec Law Dig. 27; *Thurber v. Pilon*, 4 Low. Can. J. 37.

But see *Marcoux v. Morris*, 3 R. L. 441, S. C. R. 1871, where at termination of partnership on a settlement of the accounts, one partner *acknowledged* that he owed the plaintiff \$272, and the plaintiff brought *assumpsit*, and it was held that the proper action was *pro socio*, and his action was dismissed.

When on dissolution a partner has admitted a balance to be due from him to his co-partner, *assumpsit* will lie although there be no promise to pay. *McNicol v. McEwen*, 3 Ont. K. & Q. B. 485 (old series); *Hall v. Lannin*, 30 Ont. C. P. 204, Osler, J.; *Gibson v. Moore*, 6 N. H. 547; *Feurt v. Brown*, 23 Mo. App. 332.

Where each partner was to contribute money, and the enterprise proves a failure, the partner who has failed to comply with his engagements, and has brought in nothing, should make good his proportional share. *Sangston v. Hack*, 52 Md. 173 (1879).

Misconduct of a partner, rendering firm liable, and concealed from the other partner until after dissolution, gives him right of action although at dissolution he gave the retiring partner a bond of indemnity. *Kintrea v. Charles*, 12 Ont. Ch. 123.

Of the right of agents and trustees to indemnity from their principals and cestuis que trustent.

Agent's right to indemnity.—In order to clear the way for the discussion of the right of a partner to be indemnified by his firm, it is necessary to advert shortly to the right of agents and trustees to be indemnified by their principals and *cestuis que trustent*.

With respect to agents the following cases have to be considered.

1. When the agent having instructions executes them ;
- [*370] * 2. When the agent having instructions does not follow them ;
3. When the agent having no instructions acts nevertheless for his principal.

1. **When he obeys his instructions.**—With respect to the first of these three classes of cases, nothing is clearer than that an agent who has instructions to act in a certain manner, is entitled to be reimbursed by his principal for all outlays made in pursuance of these instructions, and to be indemnified for any loss sustained by executing them (*k*). Even if what the agent does is unlawful he is entitled to indemnity (*l*); unless, indeed, the act be one which the agent must have known his principal could under no circumstances justify; for then the maxim *in pari delicto melior est positio defendentis* applies, and the agent can obtain no indemnity from a court of justice (*m*).

2. **When he disobeys his instructions.**—It is equally clear that, speaking generally, an agent who acts *contrary* to his instructions is not entitled to any indemnity or reimbursement for losses or expenses incurred whilst so acting (*n*).

(*k*) Story on Agency, § 335 *et seq.*; Paley on Agency, ch. 2; Smith, Merc. Law, pp. 119, 120, ed. 9; Curtis v. Barclay, 5 B. & C. 141. See, also, Ireland v. Livingstone, L. R. 5 Ho. Lo. 416, as to ambiguous instructions. As to costs of actions unsuccessfully defended, see Broom v. Hall, 7 C. B. N. S. 503.

(*l*) Adamson v. Jarvis, 4 Bing. 66; Betts v. Gibbins, 2 A. & E. 57; per Tindal, C. J., in Collins v. Evans, 5

Q. B. 830. See, as to conforming to an illegal custom unknown to the principal, Perry v. Barnett, 15 Q. B. D. 338.

(*m*) See Merryweather v. Nixan, 2 Sm. L. C.; Collins v. Blantern, 1 ib.; Josephs v. Pebrer, 3 B. & C. 639; Shackell v. Rosier, 2 Bing. N. C. 634.

(*n*) See Stokes v. Lewis, 1 T. R. 20; Galway v. Mathew, 10 East, 264; Child v. Morley, 8 T. R. 610; Warwick v. Slade, 3 Camp. 127.

Even although the instructions may have been given by the principal under a misapprehension of facts, and the agent, being aware that such was the case, may have acted *bonâ fide* for the benefit of his principal (*o*), still the agent will not be entitled to indemnity; for it is the duty of an agent to obey and not to disregard his orders. But if the principal chooses to ratify the agent's conduct, the latter acquires a right to be considered as having acted in pursuance of instructions, and to be entitled to reimbursement and indemnity *accordingly; for the principal cannot [*371] not, whilst ratifying the agent's conduct so far as it is beneficial, repudiate it so far as it is onerous (*p*).

Effect of revocation of authority. — The position of an agent who has already acted on his instructions, and has thereby incurred a legal obligation to third parties, is different. The better opinion is that in this case he is not bound on the command of his principal to stop short and refuse to perform the obligation incurred. There is no doubt that, as between himself and his principal, an agent is *entitled* to obey the counter order, and to obtain a full indemnity from the consequences of so doing. But it is apprehended that he is at liberty so far to carry out the instructions on which he has begun to act, as may be necessary to relieve himself from all the legal liabilities incurred before the notice of the countermand, and having done so, to insist upon indemnity and reimbursement as if the principal had not changed his instructions. *Nemo potest mutare consilium suum in alterius injuriam* is the maxim of the civil law, and expresses the correct principle for the decision of these cases (*q*).

3. **When he acts without instructions.** — There remains the third class of cases, viz., where the agent, having no instructions to guide him, acts for his principal, and then seeks to be indemnified by him. Now, here, as in the last class of cases, ratification by the principal removes all difficulty, and may be excluded from consideration. Again, an agent hav-

(*o*) *Howard v. Tucker*, 1 B. & Ad. 712.

(*p*) *Story on Agency*, § 250.

(*q*) See *Read v. Anderson*, 13 Q. B. D. 779; *Seymour v. Bridge*, 14 ib. 460; *Loring v. Davis*, 32 Ch. D. 625. The position in the text is supported by *Pothier, Mandat. No. 121*, and

Story, Agency, § 465, &c., and by *Balsh v. Hyham*, 2 P. W. 453; *Sutton v. Tatham*, 10 A. & E. 27; and the cases already cited. On the other hand, see 2 Kent Com. 644. In *Child v. Morley*, 8 T. R. 610, and *Warwick v. Slade*, 3 Camp. 127, the agent was only bound in honour.

ing no specific instructions may yet have an implied authority to act in a given way for his principal; and in the absence of orders to the contrary, an agent always has implied authority to act in the manner in which he has been accustomed to act with the approval of his principal; and to act with respect to any matter as other persons situate like himself usually act with respect to similar matters; and to take

all those steps which are usual and necessary to enable [*372] him duly to execute his instructions (*r*). It

may therefore well happen that an agent who has no positive instructions, may nevertheless act within the limits of his real authority; and so long as he keeps within those limits he is entitled to reimbursement and indemnity (*s*). The principle applicable to the first class of cases applies here; but if the agent claims an indemnity against loss sustained by the commission by him of an illegal act, he must be prepared with very strong evidence to show that such acts fell within the limits of his authority (*t*). In a case of doubt no authority to commit an unlawful act can be inferred.

Rights of a person who unasked acts for another.—The greatest difficulty arises when an agent acts without any authority, express or tacit, but *bonâ fide* for the benefit of his principal. There is a leaning in many minds in favour of the agent in such cases, and it cannot be denied that circumstances may occur which render officious conduct justifiable, and even benevolent. On the other hand, *culpa est immiscere se, rei ad se non pertinenti* (*u*); and by the law of England a person who chooses, unasked, to incur expense for another, must, speaking generally, trust rather to gratitude than to judicial aid for reimbursement (*x*). The only established exceptions to this rule seem to be — 1, where one

(*r*) Story on Agency, ch. 6.

(*s*) *Curtis v. Barclay*, 5 B. & C. 141; *Sutton v. Tatham*, 10 A. & E. 27; see, too, 1 Wms. Saund. 264 *b*; *Pettman v. Keble*, 15 Jur. 38; *Wolfe v. Horncastle*, 1 Bos. & P. 323, *per* Buller, J. This was also the principle applied in *R. v. Essex*, 4 T. R. 591, and referred to by Lord Cottenham in *A.-G. v. The Mayor of Norwich*, 2 M. & Cr. 424.

(*t*) See, as to unreasonable or illegal customs not known to the principal, *Perry v. Barnett*, 15 Q. B. D. 388.

(*u*) Dig. L. tit. 17, De Reg. Jur. L. 36.

(*x*) See *Falcke v. Scottish Imp. Ins. Co.*, 34 Ch. D. 248; *Re Leslie*, 23 Ch. D. 552. See as to the *negotiorum gestor* of the Roman law, Dig. III. tit. 5, De Negot. Gest., Thibaut's System des Pand. Recht, § 558, ed. 9.

person alone sustains a loss or incurs expense for the relief of himself and others from some risk or obligation common to all; and, 2, where one person does for another that which the latter is legally bound to do, but either cannot or will not do himself. The first class of exceptions has been already alluded to. The second may be illustrated by those cases in which executors and husbands are held liable for the expenses of funerals, although they gave *no [*373] orders for them, and took no part in them (*y*); and by cases in which one man's goods have been lawfully seized for another man's debt (*z*).

General rule.—The general rule, certainly, is that the officious conduct of one person imposes no obligation on another to compensate him for, or indemnify him from, the consequences of his own spontaneous act; and even although the other may be benefited, he cannot on that ground alone be compelled to pay for what he never sought to obtain (*a*). A very strong illustration of this is afforded by the case of *Edmiston v. Wright* (*b*). There the defendant was the owner of some estates in Georgia, and some negroes in Jamaica. The plaintiff's partner was the defendant's agent, and the general manager of his West Indian estates. The negroes in Jamaica were shipped for Georgia, and seized by Custom-house officers in consequence of the captain of the ship having neglected to procure some necessary documents. The plaintiff, for the purpose of redeeming the negroes from the authorities who had seized them, paid the sum of 1200*l.*, and the negroes were then allowed to proceed to the defendant's estate in Georgia.* The plaintiff sued the defendant for the sum of 1200*l.*, as money paid to his use, but Lord Ellenborough held that it was a voluntary payment made by the plaintiff, and one which he could not recover from the defendant.

Right of trustees to indemnity.—The right of a trustee to indemnity from his *cestui que trust* very closely resembles the right of an agent to indemnity from his principal—

1. A trustee is clearly entitled to be indemnified out of

(*y*) See *Ambrose v. Kerrison*, 10 C. B. 776; *Rogers v. Price*, 3 Y. & J. 28; *Jenkins v. Tucker*, 1 H. Bl. 91.

(*z*) *Edmunds v. Wallingford*, 14 Q. B. D. 811.

(*a*) 1 Wms. Saund. 264 *a*; 6 B. & C. 444, *per* Bayley, J.; *Stokes v. Lewis*, 1 T. R. 20; *Child v. Morley*, 8 T. R. 610.

(*b*) 1 Camp. 88.

the trust property against all costs, charges, and expenses properly incurred, and against all losses sustained by him, in the execution of his trust (*c*); and if the trust property is not sufficient for the purpose of indemnifying him in [*374] respect of such matters, * his *cestui que trust*, if under no disability, is personally liable to indemnify him (*d*), unless such liability is excluded by some special circumstance (*e*).

2. On the other hand, a trustee who commits a breach of trust is entitled to no indemnity in respect thereof, except from those *cestuis que trustent*, if any, at whose request he wrongfully acted, or who have sanctioned and benefited by his improper conduct (*f*).

3. Every act of a trustee respecting the trust property must necessarily either be warranted by the trust reposed in him, or amount to a breach of trust, and must therefore be governed by one or other of the two foregoing principles. But as with agents, so with trustees; their acts may be proper, although not expressly authorised; and whatever is necessary in order duly to execute an express trust, is warranted by that trust, and entitles the trustee to indemnity accordingly. But even this principle will not entitle a trustee to indemnity in respect of everything he may do *bonâ fide* for the benefit of his *cestui que trust*; regard must be had to the nature of the trusts to be executed.

Of some former differences between contribution at law and in equity.

1. **As to indemnity before loss has been sustained.**—Before the passing of the Judicature acts, a right to contribution or indemnity, arising otherwise than by special agreement, was

(*c*) *Re Bleckley*, 35 Beav. 419, where this rule was applied in favor of a trustee for a company against its debenture-holders. See, as to losses which may never arise, *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561; *Hobbs v. Wayet*, 36 Ch. D. 256; and as to the right of indemnity where trustees hold two funds for different sets of people, but under the same instrument, *Fraser v. Murdock*, 6 App. Ca. 855.

(*d*) See *Oriental and Commercial Bank*, 3 Ch. 791; *Balsh v. Hyham*, 2 P. W. 453; *Phene v. Gillan*, 5 Ha. 1; and *Ex parte Chippendale*, 4 De G. M. & G. 52.

(*e*) If there is an express covenant to indemnify, the obligation will be limited by the covenant. See *Selwyn v. Harrison*, 2 J. & H. 334; *Gillan v. Morrison*, 1 De G. & Sm. 421.

(*f*) See *Lewin on Trusts*, pp. 642 and 910, ed. 8.

only enforceable at law by a person who could prove that he had already sustained a loss (*g*). But in equity it was very reasonably held, that even in the absence of any *special agreement, a person who was entitled to [*375] contribution or indemnity from another could enforce his right before he had sustained actual loss (*h*) provided loss was imminent (*i*); and this principle will now prevail in all divisions of the High Court (*k*). Therefore a person who is entitled to be thus indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined, before having recourse to judicial aid. Thus, in the ordinary case of principal and surety, as soon as the creditor has acquired a right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation (*l*); and where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been damaged (*m*); and the limit of the defendant's liability to the plaintiff is the full amount for which he is liable; or if he is dead or insolvent the full amount provable against his estate, and not only the amount of dividend which such estate can pay (*n*). In strict conformity with these principles, partners and directors who are individually liable to be sued on bonds and notes, which as between them and their co-partners are to be regarded as the bonds and notes of the firm or company, are entitled to call for contribution before these bonds or notes have been actually paid (*o*). So a trus-

(*g*) See *Maxwell v. Jameson*, 2 B. & A. 51. Compare *Spark v. Heslop*, 1 E. & E. 563, and the judgment of Crompton, J., in *Randall v. Raper*, E. B. & E. 84.

(*h*) See *Hobbs v. Wayet*, 36 Ch. D. 256; *Lacey v. Hill*, 18 Eq. 182.

(*i*) *Ib*; *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561.

(*k*) See *Jud. Act. 1873*, §§ 24 and 25.

(*l*) *Wooldridge v. Norris*, 6 Eq. 410; *Nesbit v. Smith*, 2 Bro. C. C. 582. As to the right of one surety to contribution from another, see *Ex parte Snowdon*, 17 Ch. D. 44.

(*m*) See *Ranelagh v. Hayes*, 1 Vern. 190, and *Lloyd v. Dimmack*, 7 Ch. D. 398, where *Ranelagh v. Hayes* was disapproved. *Lloyd v. Dimmack* is, however, not opposed to the statements in the text nor to the cases cited on p. 375, notes (*h*), (*i*), and (*l*). See the last direction in the order, 7 Ch. D. 402.

(*n*) *Cruse v. Paine*, 6 Eq. 641, and 4 Ch. 441.

(*o*) See, for example, *The Norwich Yarn Co.'s case*, 22 Beav. 143; the money borrowed by the directors in that case was secured by their own notes, but these notes had not been actually paid when the call on the

tee of shares liable to calls is entitled to be indemnified by his *cestui que trust* against them before they are paid (*p*).
[*376] * 2. As to the amount payable by each contributory.

— Another difference between law and equity which formerly prevailed, and to which it is necessary to advert, affects the mode in which the amount to be paid by each of several contributories was ascertained.

Rule at law. — At law, before the Judicature acts, if several persons had to contribute a certain sum, the share which each had to pay, was the total amount divided by the number of contributors; and no allowance was made in the event of the inability of some of them to pay their shares (*q*).

Rule in equity. — But in equity, in the absence of agreement to the contrary (*r*), those who could pay were compellable not only to contribute their own shares, ascertained as above, but also to make good the shares of those who were unable to furnish their contributions. This rule also now prevails in all divisions of the High Court (*s*). For example, if A., B., C., and D. are liable to a debt, A. can compel B. and C. to contribute one-third each, if D. can contribute nothing; and this, as between A., B., and C., is evidently only fair and just (*t*).

In *Wadeson v. Richardson* (*u*), one of four partners assigned property to trustees upon trust, *inter alia*, to pay his proportion or share of all such debts as were or should be owing by him and his three co-partners. He and they afterwards became bankrupt; and it was held that the share and proportion of debts which the trustees were to pay was, not the share and proportion which, as between the assignor and his co-partners, he ought to contribute to the funds of the firm, but the share and proportion which, as between him and the creditors of the firm, it was necessary for him to pay, in order that they might receive twenty shillings in the

shareholders was made. This does not appear very clearly from the report referred to, but the writer has been informed by persons conversant with the case that the above statement is correct.

(*p*) *Oriental Commercial Bank*, 3 Ch. 791; *Cruse v. Paine*, 6 Eq. 641, and 4 Ch. 441. See also *Hobbs v. Wayet*, 36 Ch. D. 256, where the calls were not yet made.

(*q*) See *Cowell v. Edwards*, 2 Bos. & P. 268; *Batard v. Hawes*, 2 E. & B. 287.

(*r*) *McKewan's case*, 6 Ch. D. 447. The agreement, if any, determines the extent of the right.

(*s*) *Jud. Act. 1873*, §§ 24 and 25.

(*t*) *Dering v. Winchelsea*, 1 Cox, 318; *Hole v. Harrison*, 1 Ch. Ca. 246; *Peter v. Rich*, Rep. in Ch. 19.

(*u*) 1 V. & B. 103.

pound. The creditors were therefore held entitled to come in under the deed for so much as they could not recover from the estates of the other partners.

Rule applies where one partner ought to indemnify the rest and to the winding up of companies.—So, where a loss has been incurred under circumstances * which [*377] render it wholly chargeable to the account of the partner who caused it, yet, so far as he is unable to make it good, it must be borne rateably by the other partners (*x*). Upon the same principle, when a company is being wound up, the solvent shareholders must, if their liability to creditors is not limited, contribute whatever may be necessary to pay all the creditors in full; and must make up rateably amongst themselves what ought to have been contributed by those shareholders who are insolvent (*y*); and this holds even where the creditors are themselves shareholders, and where the liability of the shareholders is as between themselves proportionate to their shares (*z*).

Of contribution between wrong-doers.

Of contribution amongst wrong-doers.—There is a saying that there is no contribution amongst wrong-doers (*a*); but this doctrine is certainly inapplicable to partners in the general form in which it is enunciated. It is true, that if a partnership is itself illegal, no member of it can, in respect of any transaction tainted with the illegality which infects the firm, obtain relief against any other member;¹ but there

(*x*) See *Oldaker v. Lavender*, 6 Sim. 239; *Cruikshank v. McVicar*, 8 Beav. 117, 118.

(*y*) *Robinson's Ex. case*, 6 De G. M. & G. 572.

(*z*) *Professional Life Ass. Co.*, 3 Eq. 668, and 3 Ch. 167.

(*a*) *Merryweather v. Nixan*, 8 T. R. 186, and 2 Sm. L. C.; *Colburn v. Patmore*, 1 Cr. M. & R. 73; *A.-G. v. Wilson*, Cr. & Ph. 1.

¹ When the partnership is wholly illegal, as for gambling, equity will not enforce contribution. *Watson v. Fletcher*, 7 Gratt. 1.

Nor will it interfere to declare a partnership to exist and order an account on the instance of one partner when the immediate consequence would be to show that both partners were living in crime, although the partnership itself was not criminal. *Forder v. Brown*, 2 New Zea. S. C. 303.

But partner in an illegal enterprise completed has a right to an account. *Pfeuffer v. Maltby*, 54 Tex. 454; 38 Am. Rep. 631.

Agreement of two that partnership business should be carried on in name of one, the other being in debt and wishing by this means to keep the property

is no authority for saying that if one of the members of a firm sustains a loss owing to some illegal act not attributable to him, but nevertheless imputable to the firm, such loss must be borne entirely by him, and that he is not entitled to contribution in respect thereof from the other partners (*b*).

Application of doctrine to partners.—The claim of a partner to contribution from his co-partners in respect of a partnership transaction cannot be defeated on the ground of illegality, unless the partnership is itself an illegal partnership (*c*): or unless the act relied on as the basis of [*378] the claim is not only illegal, but has been committed by the partner seeking contribution, when he knew or ought to have known of its illegality (*d*). In any of these cases he can obtain no assistance against his co-partners, and must abide the consequences of his own wilful breach of the law. Upon this ground it was often held (before it became lawful for partners to carry on the business of marine insurance) that if one of a firm of marine insurers paid money in respect of a loss insured against by the firm, he could not recover any part of the payment from his co-partners (*e*).

But if the partnership is not itself illegal, and if the partner claiming contribution has not himself been personally guilty of a breach of the law, his claim will prevail, although the loss in respect of which it is made may have arisen from an unlawful act. This appears from *Campbell v. Campbell* (*f*), where a firm of distillers had incurred a penalty in

(*b*) See, at law, *Betts v. Gibbins*, 2 A. & E. 57; *Adamson v. Jarvis*, 4 Bing. 66, and see in equity, *Ramskill v. Edwards*, 31 Ch. D. 100; *Lingard v. Bromley*, 1 V. & B. 114; *Baynard v. Woolley*, 20 Beav. 583; *Ashurst v. Mason*, 20 Eq. 225.

(*c*) As to which, see *ante*, p. 91.

(*d*) See *Thomas v. Atherton*, 10

Ch. D. 185; *Adamson v. Jarvis*, 4 Bing. 66; *Betts v. Gibbins*, 2 A. & E. 57.

(*e*) *Aubert v. Maze*, 2 Bos. & P. 371.

(*f*) 7 Cl. & Fin. 166. See, too, *Thomas v. Atherton*, 10 Ch. D. 185; *Woolley v. Batte*, 2 Car. & P. 417; *Pearson v. Skelton*, 1 M. & W. 504.

from his creditors, does not exempt the partner whose name was used from rendering an account of the partnership dealings to his co-partner. *Brigham v. Smith*, 3 Ont. E. & A. 46; *Robinson & J.'s Dig.* 2684.

That plaintiff, who had for some years acted as legal adviser of the defendant, was appointed one of the directors of the railway at the same time that he claimed to be interested with defendant in the contract for its construction, formed no ground for the defendant refusing to account to the plaintiff for his share of the profits of the enterprise. *Cameron v. Bickford*, 11 Ont. App. 52. Reversed by Privy Council, not reported.

consequence of a purchase of illicit whiskey. The purchase was made by the managing partners; and one of the members of the firm, who took no part in its business, was entirely ignorant and innocent of what had been going on. The firm was convicted for the full amount of the penalties claimed; but the Crown, on being memorialised by the innocent partner and the principal of the acting partners, remitted the penalties except to the amount of 3000*l.* This sum was levied partly on the property of the firm and partly on that of the innocent partner only. He then claimed to have the whole of what he had been compelled to pay made good to him by his co-partners, on the ground that they alone had been guilty of the illegal purchases. The innocent partner obtained a verdict for the whole amount claimed, with interest; and his co-partners were adjudged liable, jointly and severally, to indemnify him. A motion for a new trial was refused. An appeal to the Lords was dismissed with costs, for technical reasons, to which it is not necessary to allude; but the Lord Chancellor, in giving the judgment of * the House, expressed a strong [*379] opinion that the defence of illegality which was set up could not be supported. His Lordship said, "If this objection could prevail, that because these parties were all guilty of a common offence, therefore out of such a transaction no contribution could arise, it would be an answer to him (*i.e.*, the innocent partner) if he had paid the whole, and demanded contribution only against the other parties."

Again, where a company had illegally commenced business before the amount of capital required by statute to be paid up had been paid up, it was held that the shareholders were nevertheless liable amongst themselves to contribute to the discharge of the debts of the company (*g*).

Where all are in *pari delicto*.—The case which presents most difficulty is one in which an unlawful act has been knowingly performed by all the partners, so that all are *in pari delicto*. There is a dictum of Lord Cottenham to the effect that in such a case each partner must bear all the loss he may happen to sustain, and that he cannot require his co-partners to share that loss (*h*); but, on the other hand,

(*g*) *Ex parte* Longworth's Executors, Johns. 465, and on appeal, 1 De G. F. and J. 17.

(*h*) See *A.-G. v. Wilson*, Cr. & Ph. 1.

there is a decision which goes far to show that the loss ought to be apportioned between all the partners, unless the illegal act in question is a pure tort (*i*), or a direct violation of some statute, or unless the contract of partnership is itself void on the ground of illegality. It is apprehended that if all the members of a firm were equally guilty of a breach of trust, and one of the firm alone had made it good out of his own moneys, he would be allowed, in taking the partnership accounts, to charge his co-partners, rateably with himself, with the amount paid by him (*k*).

[*380] *SECTION II.—OF COMPENSATION FOR TROUBLE.

Partner not entitled to charge firm for his services.—Under ordinary circumstances the contract of partnership excludes any implied contract for payment for services rendered for the firm by any of its members (*l*). Consequently, under ordinary circumstances, and in the absence of an agreement to that effect, one partner cannot charge his co-partners with any sum for compensation, whether in the shape of salary, commission, or otherwise, on account of his own trouble in conducting the partnership business (*m*),¹ and in this respect

(*i*) See *Baynard v. Woolley*, 20 Beav. 583. But see as to trespasses by mining, *Thomas v. Atherton*, 10 Ch. D. 185.

(*k*) See *Ashurst v. Mason*, 20 Eq. 225. See, further, as to contribution between wrongdoers, *Pollock, Law of Torts*, 170.

(*l*) *Thompson v. Williamson*, 7 Bli. N. S. 432, *per* Lord Wynford; *Holmes v. Higgins*, 1 B. & C. 74.

(*m*) As to a charge of commission by a ship's husband, see *Miller v. Mackay*, 31 Beav. 77, and 34 Beav. 295; as to the managing owner of a ship, see *The Meredith*, 10 P. D. 69.

¹ Partner has no right to charge firm for his services in the absence of an express agreement to that effect, unless such an agreement can be fairly inferred from the nature of the services or the actions of the other partners. *Zimmerman v. Huber*, 29 Ala. 379; *Shelton v. Knight*, 68 id. 598; *Lyman v. Lyman*, 2 Paine, C. C. 11; *Denver v. Roane*, 99 U. S. 355; *Drew v. Ferson*, 22 Wis. 651; *Heath v. Waters*, 40 Mich. 457; *Forrer v. Forrer*, 29 Gratt. 134; *Levi v. Karrick*, 13 Iowa, 344; *Gilhooly v. Hart*, 8 Daly, 176; *Strattan v. Tabb*, 8 Ill. App. 225; *Cunliff v. Dyerville & Co.*, 7 R. I. 325; *Haller v. Williamowicz*, 23 Ark. 566; *Caldwell v. Leiber*, 7 Paige, 483; *Hill v. Matta*, 12 La. Ann. 179; *Mills v. Fellows*, 30 La. Ann. 824; *Vanduzer v. McMillan*, 37 Ga. 299; *Ligare v. Peacock*, 109 Ill. 94; *Askew v. Springer*, 111 id. 662; *Boardman v. Close*, 44 Iowa, 428; *McBride v. Stradley*, 103 Ind. 465; *Dunlap v. Watson*, 124 Mass. 305; *Trump v. Baltzell*, 3 Md. 295; s. c. 1 Md. Chy. 517; *Gyger's Appeal*, 62 Penn. St. 73; s. c. 1 Am. Rep. 382; *Marsh's Appeal*, 69 id. 30; *Brown's Appeal*, 89 id. 139; *Miller's Appeal*,

a managing partner is in no different position from any other partner (*n*). Upon the same principle it has been held, that in taking the accounts of three partnerships, viz., of the firm A. and B., of its successors, A., B., and C., and of *its* successors B. and C., this last firm could not charge a commission for collecting the debts due to the two preceding firms (*o*). So, a partner employed to buy or sell goods for the firm, cannot charge it with any commission for so doing (*p*).

Rule applies though the partners may have worked unequally. — Even where the amount of the services rendered by the partners is exceedingly unequal, still, if there is no agreement that their services shall be remunerated, no charge in respect of them can be allowed in taking the partnership accounts. In such a case the remuneration to be paid to either for personal labour exceeding that contributed by the other, is considered as left to the honour of the other; and

(*n*) *Hutcheson v. Smith*, 5 Ir. Eq. 117. There a managing partner was disallowed all salary, commission, and compensation for *treating* customers.

(*o*) *Whittle v. McFarlane*, 1 Knapp, 311.

(*p*) See *Bentley v. Craven*, 18 Beav. 75.

Penn. 7 Atl. Rep. 190; *Cothran v. Knox*, 13 So. Car. 496; *Cameron v. Francisco*, 26 Ohio St. 190; *Dodson v. Dodson*, 6 Heisk. 110; *Griffey v. Northcutt*, 5 Heisk. 746; *Berry v. Jones*, 11 Heisk. 206; *Kimball v. Lincoln*, 5 Bradw. (Ill.) 316; *Dougherty v. Van Nostrand*, Hoff. Ch. 68; *Jardine v. Hope*, 19 Ont. Chy. 76; *Bradford v. Kimberly*, 3 Johns. Ch. 431; *Gregory v. Menefee*, 83 Mo. 413; *Starr v. Case*, 59 Iowa, 491; *Pierce v. Daniels*, 25 Vt. 624.

Agreement for compensation for services of one partner *implied* and apparently solely from the importance of services rendered — risk of using trust funds belonging to minors put in by co-partner with his knowledge — successful conduct of business — and small amount of actual services performed by co-partner, who was, however, a very sagacious business man and capitalist. *Emerson v. Durand*, 64 Wis. 111; s. c. 54 Am. Rep. 593.

In the following cases the partner was allowed compensation: *Fuller v. Miller*, 105 Mass. 103; *Schenkl v. Dana*, 118 Mass. 236; *Dumont v. Rueprecht*, 38 Ala. 175; *Vanduzer v. McMillan*, 37 Ga. 299; *Gyger's Appeal*, 62 Penn. St. 73; *Godfrey v. White*, 43 Mich. 171; *Cramer v. Bachmann*, 68 Mo. 310; *Stidger v. Reynolds*, 10 Ohio, 351; *Phillips v. Turner*, 2 Dev. & Bat. Eq. 123; *Honore v. Colmesnil*, 1 J. J. Mar. 506; *Bradford v. Kimberly*, 3 Johns. Chy. 431; *Setzer v. Beale*, 10 W. Va. 274; *Griggs v. Clark*, 23 Cal. 427; *Weaver v. Upton*, 7 Ired. L. 458; *Hite v. Hite*, 1 B. Mon. 177; *Newell v. Humphrey*, 37 Vt. 265; *Osment v. McElrath*, 68 Cal. 466; *Lewis v. Moffett*, 11 Ill. 392.

In *Newland v. Tate*, 3 Ired. Eq. 226, the purchaser of a half-partner's share was allowed compensation as not being a partner.

So when a partner fails to perform his agreement to render services to the firm, he may be charged on the settlement of the firm's accounts with the value of the services which he agreed to give and refused to render. *Marsh's Appeal*, 69 Penn. St. 30; s. c. 8 Am. Rep. 206.

where that principle is wanting, a court of justice cannot supply it (*q*).

[*381] * **Wilful inattention to business.** — But where, as is usually the case, it is the duty of each partner to attend to the partnership business, and one partner in breach of his duty wilfully leaves the others to carry on the partnership business unaided, they are, it would seem, entitled to compensation for their services. In *Airey v. Borham* (*r*), two partners had agreed to devote their whole time to the partnership business; they quarrelled, and one of them only afterwards attended to it: the partnership was ultimately dissolved, and an inquiry was directed for the purpose of ascertaining what allowance ought to be made to him for having carried on the business alone.

Rule as to services rendered after a dissolution. — The rule, moreover, which precludes a partner from charging his co-partners with payment for his services, does not apply to services rendered in carrying on the business of the firm after its dissolution: and it has been held that a surviving partner who carries on the business of the firm for the benefit thereof is entitled to remuneration for his trouble in so doing (*s*); unless there be some special reason to the contrary, as where he is the executor of his deceased partner (*t*).

Indian allowances. — In India an executor is allowed a percentage on the assets collected by him; and a surviving partner who is the executor of his deceased co-partner, has been allowed this percentage even on the amount due from the partnership to the estate of the deceased (*u*).¹

(*q*) See *per* Wigram, V.-C., in *Webster v. Bray*, 7 Ha. 179. In that case an allowance for trouble was made to the defendant, but it was offered by the plaintiff. In *Robinson v. Anderson*, 20 Beav. 98, which was a similar case, no allowance was offered, nor was any given by the Court.

(*r*) *Airey v. Borham*, 29 Beav. 620.

(*s*) *Featherstonhaugh v. Turner*,

25 Beav. 382; *Brown v. De Tastet*, Jac. 284; *Crawshay v. Collins*, 2 Russ. 347. See, also, *Mellersh v. Keen*, 27 Beav. 242, where one partner became lunatic, and the business was continued by the others.

(*t*) *Burden v. Burden*, 1 V. & B. 172; *Stocken v. Dawson*, 6 Beav. 371.

(*u*) *Cockerell v. Barber*, 2 Russ. 585, and 1 Sim. 23.

¹ Surviving partner continuing the business at his own peril, being under no obligation to do so, the deceased partners' representatives, if they elect to share the profits, must consent to a reasonable allowance for compensation for the services. *Osment v. McElrath*, 68 Cal. 466; *Griggs v. Clark*, 23 id. 427; *Cameron v. Francisco*, 26 Ohio St. 190; *Hite v. Hite*, 1 B. Mon. 177; *Royster v. Johnson*, 73 N. C. 474; *Frazier v. Frazier*, 77 Va. 775; *Wilby v. Phinney*, 15 Mass. 116; *Washburn v. Goodman*, 17 Pick. 519; *Schenkl v.*

SECTION III.—OF OUTLAYS AND ADVANCES.

Outlays and advances made by one partner.—In taking a partnership account, each partner is entitled to be allowed against the other everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, * or has taken out more than he ought;¹ and nothing [*382] is to be considered as his share but his proportion of the residue on the balance of the account (*x*). Although, therefore, a partner is not entitled to compensation for trouble, he is entitled to charge the partnership with sums *bonâ fide* expended by him in conducting the business thereof (*y*).² Thus, where the managing director of a cost-book mining company advanced money for the purpose of enabling

(*x*) *Per* Lord Hardwicke in *West v. Skip*, 1 Ves. S. 242.

(*y*) *Burden v. Burden*, 1 V. & B. 172, where a surviving partner, who was also executor, was allowed to

charge expenses actually incurred, but not time and trouble. Compare *Hutcheson v. Smith*, 5 Ir. Eq. 117, *ante*, p. 380, note (*n*).

Dana, 118 Mass. 236; *Newell v. Humphrey*, 37 Vt. 265. *Contra*: *Brown v. McFarland*, 41 Penn. St. 120; *Shelton v. Knight*, 68 Ala. 598; *Lyman v. Lyman*, 2 Paine C. C. 102; *Dayton v. Bartlett*, 38 Ohio St. 357; *Patton v. Calhoun*, 4 Gratt. 138; *Utley v. Smith*, 24 Conn. 290; *Denver v. Roane*, 99 U. S. 355; but see *dictum* of Strong, J.

¹ *Hobbs v. McLean*, 117 U. S. 567, 29 L. ed. 940.

² Allowance will be made to partners for actual proper outlays and advances for benefit of firm, duly authorized, and on proper proof. *Beaver v. Lewis*, 14 Ark. 138; *Nichol v. Stewart*, 36 id. 612; *King v. Hamilton*, 16 Ill. 190; *Savage v. Carter*, 9 Dana, 408; *Tomlinson v. Ward*, 2 Conn. 396; *Tillotson v. Tillotson*, 34 id. 335; *Pond v. Clark*, 24 id. 370; *Pratt v. McHatton*, 11 La. Ann. 260; *Harvey v. Varney*, 104 Mass. 436; *Meserve v. Andrews*, 106 Mass. 419; *Godfrey v. White*, 43 Mich. 171, 188; *Clement v. Mitchell*, Phill. Eq. 3; *Boyd v. Foot*, 5 Bosw. 110; *Hutchinson v. Onderdonk*, 6 N. J. Eq. 277, 632; *Coddington v. Idell*, 29 id. 504, 30 id. 540; *Wilson v. Lineberger*, 83 N. C. 524; *Richardson v. Wyatt*, 2 Desau. 471 (So. Car.); *Chandler v. Allen*, 20 Hun, 424; *Burleigh v. White*, 70 Me. 130; *Stegman v. Berryhill*, 72 Mo. 307; *Newell v. Humphrey*, 37 Vt. 265; *Porter v. Wheeler*, id. 281.

Allowance for them even when the contracts on account of which they were made were in the claiming partner's name but for use of the firm, he being bound to show they were so for its use. *Rodes v. Rodes*, 6 B. Mon. 400.

K. bought of J., F. & Co., for the account of himself and W., certain stage property for \$53,000, paying \$10,600 cash and notes for the balance indorsed by W. The business was continued by K. & W., and afterwards M. purchased one-third interest, being admitted as partner from the date of the purchase, and signing his name to the notes previously given W., J., F. & Co. W. paid one-third of the \$53,000 to J., F. & Co., and K. paid the balance. Subsequently K. sold to W. & M. all his interest in the firm.

Held, that if the excess paid by K. over and above his just proportion was an advance to the firm, his claim for it against the firm had been released by

the business of the company to be carried on, he was held entitled to be reimbursed by the company, there being no question as to his authority to carry on the business on credit (*z*). So, where the directors of a mining company advanced money to keep the mine at work, and it would otherwise have been drowned, they were held entitled to be reimbursed, although they had no power to borrow money on the credit of the company (*a*).

Payments on account of debts.—So a partner is clearly entitled to charge the firm with whatever he may have been compelled to pay in respect of its debts (*b*); or in respect of

(*z*) *Ex parte* Sedgwick, 2 Jur. N. S. 949.

(*a*) *Ex parte* Chippendale, 4 De G. M. & G. 19. See *ante*, book ii. ch. 1, § 6. This case, and others of the same class, will be noticed more at length in the vol. on Companies.

(*b*) *Prole v. Masterman*, 21 Beav. 61. A partner who negligently pays a debt claimed, but not due, cannot charge the payment to the firm, *Re Webb*, 2 B. Moore, 500; *McIlreath v. Margetson*, 4 Doug. 278; noticed in the next section.

the sale of his interest to W. & M. If it was an advance to M. alone, he must look to M. and not to W. & M; *Kimball v. Walker*, 30 Ill. 482.

Partnership contract reformed so as to entitle one partner to credit for the plant in taking the partnership accounts. *Macdonald v. Worthington*, 7 Ont. App. 531. But see *Worthington v. McDonald*, 9 Duval, 327.

By the law of Quebec, if nothing were provided by the articles as to the ownership of the plant, it would be taken out of the partnership at the conclusion of the same by the party who had contributed it, before division of profits. *Macdonald v. Worthington*, 7 Ont. App. 531.

Partner entitled, on taking the partnership accounts, to a credit for the plant inventoried at \$40,000, is to have that credit less the amount of \$24,000 pre-existing liens on plant paid off with partnership moneys. *Worthington v. McDonald*, 9 Duval, 327; varying *Macdonald v. Worthington*, 7 Ont. App. 531.

In *Mumford v. Murray*, 5 Johns. Ch. 1, the court thought that where one partner staid at home and conducted the partnership business, and the other went abroad on his own and the firm's business, receiving from the firm as compensation \$5000, that he might not also charge up for his *expenses*.

Where one furnishes capital and the other experience and services, and they share profits and losses equally, the latter is not entitled on dissolution to any part of the original capital. *Shea v. Donahue*, 15 Lea, 160 (Tenn.); s. c. 54 Am. Rep. 497.

Where equal partners divided profits equally, and one had contributed \$2165.75 more capital than the other, this should be treated as a loan to the firm on interest and not as capital stock. *Emerson v. Durand*, 64 Wis. 111; s. c. 54 Am. Rep. 593.

Where partners in banking agreed that each should be allowed 6½ per cent interest annually on average of deposits, and should be charged 10 per cent on amount of his overdrafts, held, not usurious; in such a case the overdraft is not a loan. *Payne v. Freer*, 91 N. Y. 43; 43 Am. Rep. 640. Could the firm, as such, have sued the partner even in equity for amount of his overdraft?

obligations incurred by him alone at the request of the firm, as where he is compelled to pay a bond given by himself but for the benefit of the firm and as a trustee for it (*e*), or where he sacrifices a debt due to himself in order to enable the firm to obtain a debt due to it (*d*).

Useless outlays. — It need hardly be observed, that an outlay made by one partner with the approbation of his co-partners and for the benefit of the firm, must be made good by the firm, however * useless the outlay may [*383] have been. For example, if a firm purchases a patent which is paid for by one member individually, he is entitled to charge the purchase-money to the firm, however worthless the patent may ultimately prove to be (*e*). On the other hand, if a partner makes an improper outlay or advance on behalf of a firm, he cannot charge it to the firm, unless his conduct is ratified by it; or unless the firm's assets have been increased or preserved by such outlay or advance.

Useful but unauthorised outlays. — This last qualification is rendered necessary by The German Mining Company's Case (*f*).

An outlay which may have been very proper and even necessary for the conduct of the partnership business, cannot be charged to the partnership account, if so to do would be inconsistent with the agreement into which the partners have entered. In *Thornton v. Procter* (*g*), the plaintiff and the defendant had become partners as wine-merchants, and the plaintiff, who for some time had principally conducted the business, had expended considerable sums of money in treating customers, and this was found to be necessary in that trade. The plaintiff had for several years kept the accounts of the partnership, and in such accounts he never made any charge for entertaining customers, or demanded any allowance on that account. He, nevertheless, afterwards contended that he ought to be allowed, in taking the accounts of the partnership, to debit the firm with 50*l.* a year for en-

(*c*) *Croxton's case*, 5 De G. & S. 432; *Sedgwick's case*, 2 Jur. N. S. 949, V.-C. W.; *Gleadow v. The Hull Glass Co.*, 13 Jur. 1020, V.-C. E.

(*d*) *Lefroy v. Gore*, 1 Jo. & Lat. 571, where one partner released a witness whose evidence was essential to the firm.

(*e*) *Gleadow v. The Hull Glass Co.*, 13 Jur. 1020.

(*f*) 4 De G. M. & G. 19. See *ante*, book ii. ch. 1, § 6.

(*g*) 1 Anstr. 94. See, too, *Hutcherson v. Smith*, 5 Ir. Eq. 117; *East India Co. v. Blake, Finch*, 117.

ertainments, and this was proved to be a reasonable sum. But it was shown to be usual, in cases of this sort, to insert some special clause in the articles if an allowance was intended to be made, and the articles into which the partners had entered contained nothing more than a general stipulation, that all losses and expenses should be borne equally. It was accordingly held that the plaintiff was not entitled to any allowance, for he could only claim it as being a gross article of expenditure, and he was precluded from charging it in that way by not having included it in the yearly accounts.

[*384] * **No allowance for expenses unless proved to have been incurred.** — A partner is not entitled to charge the firm with any monies alleged by him to have been laid out for the benefit of the firm if he declines to give the particulars of his outlays; he cannot charge for secret service money (*h*), nor for general expenses (*i*). Nor can a partner charge the firm with travelling expenses unless they have been *bonâ fide* and properly incurred by him when travelling for the purpose of transacting its business (*k*).

Charges for valuation. — Again, a partner expending money for valuations to carry out a transaction between himself and co-partners, which they afterwards succeed in setting aside, cannot charge them with any part of what he may have so expended (*l*).

Not only may one partner make outlays or advances for the benefit of the firm, but the firm may make advances and outlays to or for the benefit of one partner. Under ordinary circumstances such advances and outlays will be equivalent to a loan by the firm to him, and must be treated accordingly in taking the partnership accounts.

Outlays on separate property of one partner. — But occasionally considerable difficulty arises, *e.g.*, where there has been an outlay by the firm on property belonging exclusively to one of the partners, but used by the firm for partnership purposes. In the absence of all evidence of any agreement upon the subject, justice seems to require that in taking the

(*h*) See *The York and North Midland Rail. Co. v. Hudson*, 16 Beav. 485.

(*k*) *Stainton v. The Carron Co.*, 24 Beav. 356.

(*i*) *The East India Co. v. Blake*, Finch, 117.

(*l*) *Stocken v. Dawson*, 6 Beav. 375.

partnership accounts the owner of the property in question should not be allowed exclusively to gain the benefit of the outlay, but that the improved value of his property should be treated as a partnership asset, and be shared between him and his co-partners accordingly (*m*).

In *Burdon v. Barkus*, a managing partner had, with the knowledge of his co-partner, expended partnership monies in sinking a pit for partnership purposes on land which belonged exclusively to the latter partner; the managing partner had erroneously supposed that the partnership was for a term of years; but the partnership was suddenly and unexpectedly *dissolved, and the pit thereby became the [*385] sole property of the partner in whose land it had been sunk; but an inquiry was directed whether any allowance should be made in respect of the outlay in sinking the pit (*n*). So in *Pawsey v. Armstrong* (*o*) an inquiry was directed as to buildings erected by a firm on the property of one of the partners.

SECTION IV.—OF DEBTS, LIABILITIES, AND LOSSES.

Mutuality of profit and loss presumed.—In the absence of any agreement to the contrary, partners are liable to share losses in the same proportion as they are entitled to share profits (*p*).¹ As a general rule, therefore, if one partner has been compelled to pay more than his share of a partnership

(*m*) See *ante*, p. 330.

(*n*) *Burdon v. Barkus*, 3 Giff. 412, aff. on appeal, 4 De G. F. & J. 42.

(*o*) 18 Ch. D. 707. Compare the converse case, *Bank of England case*, 3 De G. F. & J. 645, *ante*, p. 330.

(*p*) See *Re Albion Life Ass. Soc.*, 16 Ch. D. 83, where this rule was recognised, but was held not to apply to policy holders participating in profits.

¹ Losses to be shared same as profits, and in the absence of agreement presumption is that they are to be shared equally. *Whitcomb v. Converse*, 119 Mass. 38; *Bradbury v. Smith*, 21 Me. 117; *Savery v. Thurston*, 4 Bradw. (Ill.) 55; *Julio v. Ingalls*, 1 Allen, 41; *Jenkins v. Peckinpough*, 40 Ind. 133; *Carlisle v. Tenbrook*, 57 Ind. 529; 3 Kent, 28, 29.

A partnership of two civil engineers and architects was to divide the profits in shares of three-fifths and two-fifths. During the partnership they invested partnership moneys in the purchase of real estate, which resulted in a loss. Held, that this loss was to be borne by the partners in the same proportion as they were to share the profits and loss of their other business. *Storm v. Cumberland*, 18 Ont. Chy. 245.

debt, or if, in properly conducting the affairs of the firm, he has personally incurred a liability, he is entitled to be indemnified by his co-partners so far as may be necessary to place all on a footing of equality (*q*).

Presumption rebutted by evidence.— But it by no means follows, that a person liable to be sued as if he were a partner, is, as between himself and his co-partners, bound to share the losses of the firm; for his co-partners may have agreed to indemnify him altogether from losses, and if such is the case, they cannot require him to contribute thereto with them (*r*). So, where the promoters of a company agree with the shareholders that certain preliminary expenses to be incurred in obtaining surveys, reports, &c., shall not exceed a certain sum, and the promoters spend more than that sum, they cannot require the shareholders to make good the difference; although the extra expenditure may have been caused by circumstances which were unforeseen and over which the promoters had no control (*s*).

[*386] *** General obligation of partners to contribute to losses.**— The general principle, however, that partners must contribute ratably to their shares towards the losses and debts of the firm, is not open to question. Their obligation to contribute is not necessarily founded upon, although it may be modified and even excluded altogether by, agreement (*t*). For example, where there is no agreement to the contrary, it is clear that if execution for a partnership debt contracted by all the partners, or by some of them when acting within the limits of their authority, is levied on any one partner, who is compelled to pay the whole debt, he is entitled to contribution from his co-partners (*u*). So, if one partner enters into a contract on behalf of the firm, but in such a manner as to render himself alone liable to be sued, he is entitled to be indemnified by the firm, provided he has not, as between himself and his co-partners, exceeded his

(*q*) *Wright v. Hunter*, 5 Ves. 792; and see *Robinson's Executors' case*, 6 De G. M. & G. 572; *Lefroy v. Gore*, 1 Jo. & Lat. 571, and *Hamilton v. Smith*, 7 W. R. 173, as to promoters of companies.

(*r*) See *Geddes v. Wallace*, 2 Bli. 270.

(*s*) *Gillan v. Morrison*, 1 De G. & S. 421; *Re The Worcester Corn Ex.*

Co., 3 De G. M. & G. 180. See, too, *Mowatt and Elliott's case*, 3 De G. M. & G. 254, and *Carew's case*, 7 ib. 43.

(*t*) *Ante*, p. 368.

(*u*) *McOwen v. Hunter*, 1 Dr. & Walsh. 347; *Evans v. Yeatherd*, 2 Bing. 132; *Robinson's Executors' case*, 6 De G. M. & G. 572. See, too, *Lefroy v. Gore*, 1 Jo. & Lat. 571, as to provisional directors.

authority in entering into the contract (*x*); and if, in such a case, he with their knowledge and consent defend an action brought against him, he is entitled to be indemnified by the firm against the damages, costs, and expenses which he may be compelled to pay (*y*).

Losses attributable to one partner more than to another.— Even if a loss sustained by a firm is imputable to the conduct of one partner more than to that of another, still, if the former acted *bonâ fide* with a view to the benefit of the firm, and without culpable negligence, the loss must be borne equally by all.¹ Thus, where A. represented to his co-partner B. that shares in a certain company rendered the holders only liable to the engagements of the company to a limited extent, and B. thereupon, and at A.'s request, authorised him to take shares on the partnership account, and it ultimately turned out that the liability of the shareholders was not limited, and A. and B. were made contributories, it was held that, as between * themselves, B. could not throw the loss [*387] on A. alone (*z*). Again, in *Cragg v. Ford* (*a*), the plaintiff and the defendant were partners, and the defendant was the managing partner. The partnership was dissolved, and the winding up of its affairs devolved on the defendant. Part of the assets consisted of bales of cotton, and the plaintiff requested that these might be immediately sold. The defendant, however, delayed to sell them, and they were ultimately sold at a much lower price than they would have fetched if they had been sold when the plaintiff desired. The plaintiff contended that the loss sustained by the postponement of the

(*x*) *Gleadow v. The Hull Glass Co.*, 13 Jur. 1020; *Sedgwick's case*, 2 Jur. N. S. 949.

(*y*) *Browne v. Gibbins*, 5 Bro. P. C. 491; *Croxtan's case*, 5 De G. & S. 432.

(*z*) *Ex parte Letts and Steer*, 26 L. J. Ch. 455. See, too, *Lingard v. Bromley*, 1 V. & B. 114.

(*a*) 1 Y. & C. C. C. 280.

¹ Losses not to be borne by the managing partner only. *Roberts v. Totten*, 13 Ark. 609; *McCrae v. Robeson*, 2 Murph. 127; *Campbell v. Stewart*, 34 Ill. 151.

Otherwise when the partner causing the loss is to blame, and his act causing it is in violation of the articles. *Haller v. Williamowicz*, 23 Ark. 566; *Bohrer v. Drake*, 33 Minn. 408; *Richardson v. Wyatt*, 2 Desau. 471 (So. Car.); *Bonis v. Louvrier*, 8 La. Ann. 4; *Smith v. Loring*, 2 Ohio, 440; *Smith v. Hazleton*, 34 Ind. 481; *Grove v. Miles*, 85 Ill. 85; *Cockrell v. Thompson*, 85 Mo. 510; *Looney v. Gillenwaters*, 11 Heisk. 133; *Pratt v. McHatton*, 11 La. Ann. 260; *Pierce v. Daniels*, 25 Vt. 624; *Honore v. Colmesnil*, 1 J. J. Mar. 506 (Ky.); *Lefever v. Underwood*, 41 Penn. St. 505; *Reis v. Hellman*, 25 Ohio St. 180.

sale ought to be borne by the defendant alone. But the Court held that the plaintiff, if he had chosen, might himself have sold the cotton; and that, as the defendant, in delaying the sale, had acted *bonâ fide* and in the exercise of his discretion, the loss ought not to be thrown on him alone, but ought to be shared by the plaintiff.

Losses attributable to one partner's misconduct or negligence.

— But if a partner is guilty of a breach of his duty to the firm, and loss results therefrom, such loss must fall on him alone. As was said by the Court in *Bury v. Allen* (*b*), “Suppose the case of an act of fraud, or culpable negligence, or wilful default by a partner during the partnership to the damage of its property or interests, in breach of his duty to the partnership: whether at law compellable or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect” (*c*). In conformity with this rule, the justice of which cannot be disputed, it has been decided that if a claim is made against a firm for payment of a debt alleged to be due from it, but which is not so in point of fact, and one partner chooses to pay it, he cannot charge such payment to the account [*388] of the firm (*d*). So, if one partner does that *which, though imputable to the firm on the principles of agency, is in truth his act alone, and a fraud upon his co-partners, they are entitled, as between themselves and him, to throw the whole of the consequences upon him (*e*). So, if one partner, without the authority of his co-partners, wilfully does that which is illegal, he must indemnify them from the consequences (*f*).

Adoption by firm of losses not chargeable to it.— When it is said that losses incurred by the unauthorised, culpably negligent, or fraudulent conduct of one partner must be borne by him alone, it is assumed that his conduct has not been ratified by the firm, and that the loss has not been

(*b*) 1 Coll. 604.

(*c*) See acc. *Thomas v. Atherton*, 16 Ch. D. 185, a case of gross negligence on the part of the managing partner of a mine working beyond the boundary.

(*d*) *Re Webb*, 2 B. Moore, 500; *McIlreath v. Margetson*, 4 Doug. 278, where a payment was made *bonâ fide* and on the faith of false and fraudu-

lent representations. *Quere* if the same rule would apply if the debt being due was barred by the Statute of Limitations. See *Stahlschmidt v. Lett*, 1 Sm. & G. 415.

(*e*) See *Robertson v. Southgate*, 6 Ha. 540.

(*f*) See *Campbell v. Campbell*, 7 Cl. & Fin. 166, *ante*, p. 378.

treated by the partners themselves as a partnership loss. A loss which is properly chargeable to the account of one partner only, becomes chargeable to the firm if the partners have knowingly allowed it to be so charged in their accounts, and have thus taken it upon themselves. A strong instance of this is afforded by the case of *Cragg v. Ford (g)*, already referred to on another point. There the plaintiff and the defendant were partners; the defendant had engaged in adventures not authorised by the partnership articles. The plaintiff protested against this, but although the adventures ended in loss, and that loss was charged against the firm in the partnership books, the plaintiff did not at the time object, or insist that the loss should be borne by the defendant. When, however, the partnership was dissolved, and its accounts were made up, the plaintiff refused to allow the losses in question to be charged against the firm. But the Court held that, under all the circumstance of the case, the Master who had charged the losses against the partnership had not done wrong; and exceptions which had been taken to his report by the plaintiff were overruled.

* SECTION V.—OF INTEREST.

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Interest in accounts between partners.—The principles upon which, in taking partnership accounts, interest is allowed or disallowed, do not appear to be well settled. The state of the authorities is, in fact, not such as to justify the deduction from them of any general principle upon this important subject.¹

General rule as to interest.—By the common law, in the

(g) 1 Y. & C. C. C. 285; but see as to losses arising from illegal acts, *Watts v. Brook*, in *Aubert v. Maze*, 2 Bos. & P. 371. the observations of Lord Eldon on

¹ Interest is not allowable as a matter of course in advances of capital made to a partnership for partnership purposes. *Jardine v. Hope*, 19 Ont. Chy. 76.

An agreement to purchase goods on joint account and joint risk, one party to furnish the funds in the first instance. Held, interest not to be charged on funds so furnished. *Ib.*

Where defendant at dissolution was to receive £150 more than plaintiff, and was cause of delay of settlement of accounts, he was not entitled to interest from date of dissolution. *O'Lone v. O'Lone*, 2 Ont. Chy. 125.

Parties contemplating partnership in Canada agreed each to pay in \$8000

absence of a special custom or agreement, a loan does not bear interest (*h*): and, notwithstanding many dicta to the contrary, the same rule appears to have prevailed in equity (*i*). This rule is, no doubt, attributable to the old notions on the subject of usury; but although the usury laws are abolished the rule remains, and the consequence is that interest is frequently not payable by law when in justice it ought to be.

At the same time, by the custom of merchants interest has long been payable in cases where by the general law it was not: and mercantile usage and the course of trade dealings are held to authorise a demand for interest in cases where it would not otherwise be payable (*k*). In applying therefore the general rule against the allowance of interest to partnership accounts, attention must be paid not only to any express agreement which may have been entered into on the subject, but also to the practice of each particular firm, and to the custom of the trade it carries on.

(*h*) See *Calton v. Bragg*, 15 East, 223; *Higgins v. Sargent*, 2 B. & C. 349; *Shaw v. Picton*, 4 ib. 723; *Page v. Newman*, 9 B. & C. 378; *Gwyn v. Godby*, 4 Taunt. 346.

(*i*) See *Tew v. The Earl of Winton*, 1 Ves. J. 451; *Creuzer v. Hunter*, 2 ib. 157; *Booth v. Leycester*, 1 Keen, 247, and 3 M. & Cr. 459.

(*k*) See *Ex parte Chippendale*, 4 De G. M. & G. 36.

capital. One omitted to pay any portion of it. Held, that this omission was no ground for charging interest. *Wilson v. McCarty*, 25 Ont. Chy. 152.

Interest is not chargeable after dissolution in favor of one partner against the other. *Ib.*

The same partner drew bills in the name of the firm, and used the proceeds for his individual purposes. Held, that he was chargeable with interest on these. *Ib.*

Master has discretion in taking partnership accounts to charge partners guilty of misrepresentation to incoming partner, with either interest or trade profits on advances which such misrepresentations made it necessary for the incoming partner to make. *Davidson v. Thirkell*, 3 Chancery, 330 (Ont.).

Interest allowed to and against each partner on advances by and to him during partnership. *Davidson v. Thirkell*, 3 Chancery, 330 (Ont.).

One partner was allowed for advances made by him for the purposes of the business, during a time when he and his co-partner both claimed, on different grounds, that partnership did not exist, but court held that it did. *Davidson v. Thirkell*, 3 Chancery, 330 (Ont.).

It is contrary to usual course to charge partners with what, but for their wilful default, they would have received. *Davidson v. Thirkell*, 3 Chancery, 330 (Ont.). See *Cameron v. Watson*, 10 Rich. Eq. 64; *Emerson v. Durand*, 64 Wis. 111; s. c. 54 Am. Rep. 593; *Tirrell v. Jones*, 39 Cal. 655; *Jardine v. Hope*, 19 Ont. Chy. 76; *Desha v. Smith*, 20 Ala. 747; *Ligare v. Peacock*, 109 Ill. 94; *Hartman v. Woehr*, 18 N. J. Eq. 383; *Clark v. Warden*, 10 Neb. 87; *Wilson v. McCarty*, 25 Ont. Chy. 152.

Interest on capital.—As a general rule partners are not entitled to interest on their respective capitals unless there is some agreement to that effect, or unless they have themselves been in the habit of charging such interest in their accounts (*l*); and even where one partner has brought in his stipulated capital and the other *has not, the [*390] former will not be entitled to interest on the winding up of the partnership if it has not been previously charged and allowed in the accounts of the firm (*m*); and where a person is paid for his services by a share of profits, interest on capital cannot be charged against him, unless there is some agreement to that effect (*n*). Moreover, where interest on capital is payable, the interest stops at the date of dissolution unless otherwise agreed (*o*); and undrawn profits are not necessarily to be treated as bearing interest like the capital (*p*).

Interest on advances to the firm.—An advance by a partner to a firm is not treated as an increase of his capital, but rather as a loan on which interest ought to be paid; and by usage, interest is payable on money *bonâ fide* advanced by one partner for partnership purposes; at least when the advance is made with the knowledge of the other partners (*q*). The rate of interest given in such cases, is simple interest at 5 per cent. (*r*), unless a different rate is payable by the custom of the particular trade (*s*), or has been charged and allowed in the books of the particular partnership (*t*).

(*l*) See *Cooke v. Benbow*, 3 De G. J. & Sm. 1; *Miller v. Craig*, 6 Beav. 433, where interest was allowed, that having at one time been in accordance with the usage of those who carried on the business; and *Pim v. Harris*, Ir. Rep. 10 Eq. 442, where the decision was based on the terms of the contract.

(*m*) *Hill v. King*, 3 De G. S. & Sm. 418.

(*n*) *Rishton v. Grissell*, 5 Eq. 326, where the capital was borrowed at interest.

(*o*) *Barfield v. Loughborough*, 8 Ch. 1; *Watney v. Wells*, 2 Ch. 250; *Pilling v. Pilling*, 3 De G. J. & Sm. 162, *contra*, on this point is practically overruled. As to the calculation of interest where the capital is payable

by instalments with interest, see *Ewing v. Ewing*, 8 App. Ca. 822.

(*p*) *Dinham v. Bradford*, 5 Ch. 519. See, also, *Rishton v. Grissell*, 10 Eq. 393, as to interest on arrears of a share of profits.

(*q*) See *Ex parte Chippendale*, 4 De G. M. & G. 36. See, also, *Omychund v. Barker*, Coll. on Partn. 231, note; *Denton v. Rodie*, 3 Camp. 496. But see *contra*, *Stevens v. Cook*, 5 Jur. N. S. 1415.

(*r*) *Ex parte Bignold*, 22 Beav. 167; *Troup's case*, 29 ib. 353. See, also, *Hart v. Clarke*, 6 De G. M. & G. 254.

(*s*) As to compound interest in the case of bankers, see *Bate v. Robins*, 32 Beav. 73; *Fergusson v. Fyffe*, 8 Cl. & Fin. 121.

(*t*) As in *Re Magdalena Steam*

Interest on overdrawings and balances in hand. — Inasmuch as what is fair for one partner is so for another, and the firm when debtor is charged with interest, it seems to follow that if one partner is indebted to the firm either in respect of money borrowed, or in respect of balances in his hands, he ought to be charged with interest on the amount so owing, even though on the balance of the whole account, a [*391] *sum might be due to him (*u*). Except, however, where there has been a fraudulent retention (*x*), or an improper application (*y*) of money of the firm, it is not the practice of the Court to charge a partner with interest on money of the firm in his hands (*z*); for example, under ordinary circumstances a partner is not charged with interest on sums drawn out by him (*a*). In a case (*b*), A. and B. were partners: A. died, and his son and executor C. succeeded him in partnership with B. B. afterwards retired in favor of his own son D. At the time of B's retirement, a considerable sum was due to him from A's estate in respect of monies drawn out by A. This sum was treated as a debt of the new firm of C. and D., and had not been paid off. B. having died, his executors claimed interest from the time of his retirement; but the claim was disallowed on the ground that no agreement to pay interest had been entered into, and the claim was opposed to the course of dealing between the partners themselves.

Interest where firm claims what has been obtained by one partner. — Where one partner claims a benefit obtained by his co-partner and succeeds in establishing his claim, the claimant is charged, as the price of the relief afforded, not only with the amount actually expended by his co-partner in obtaining the benefit, but with interest on that amount at the rate of 5*l.* per cent. (*c*). On the other hand, if one part-

Nav. Co., *Johns*, 690, where 6 per cent. was allowed.

(*u*) See *Beecher v. Guilburn*, *Moseley*, 3.

(*x*) As in *Hutcheson v. Smith*, 5 Ir. Eq. 117, where, however, the partner retaining the money was also a receiver appointed by the Court.

(*y*) As in *Evans v. Coventry*, 8 De G. M. & G. 835.

(*z*) See *Webster v. Bray*, 7 Ha. 159, where interest on balances in

the hands of the defendants was asked for but not given. See, too, *Stevens v. Cook*, 5 Jur. N. S. 1415; *Turner v. Burkinshaw*, 2 Ch. 488.

(*a*) *Cooke v. Benbow*, 3 De G. J. & Sm. 1; *Meymott v. Meymott*, 31 Beav. 445. See the case in the next note.

(*b*) *Rhodes v. Rhodes*, *Johns*, 653, but better reported in 6 Jur. N. S. 600.

(*c*) See *Hart v. Clarke*, 6 De G.

ner has, in breach of the good faith due to his co-partners, obtained money which he is afterwards compelled to account for to the firm, he will be charged with interest upon the amount at the rate of 4*l.* per cent. (*d*).

* **Confused accounts.**—Where a partnership has been [*392] dissolved by the death of one partner, and the surviving partner keeps the accounts in such a way as to render it impossible, until after the lapse of a considerable time, to ascertain the balances due to himself and his deceased partner, neither the surviving partner nor his representatives can claim interest on the sum ultimately found due to him or his estate (*e*).

M. & G. 254. See, too, *Perens v.*
Johnson, 3 Sm. & G. 419.

(*e*) *Boddam v. Ryley*, 1 Bro. C. C.
239; 2 ib. 2; and 4 Bro. P. C. 561.

(*d*) See *Fawcett v. Whitehouse*,
1 R. & M. 132.

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*CHAPTER VII.

OF THE DIVISION OF PROFITS.

Division of profits.—The realisation and division of profit is the ultimate object of every partnership; and the right of every partner to a share of the profits made by the firm to which he belongs, is too obvious to require comment. Where there is no right to share profits, there can be no partnership, and almost all the other rights possessed by partners may be said to be incidental to the right in question.

Times, &c., of division.—The times at which the profits are to be divided, the quantum to be divided at any one time, the sums, if any, which are to be placed to the debit of the firm in favour of any particular partner for salary, interest on capital, &c., before any profits are to be divided, these and all similar matters are usually made the subject of express agreement; but where no such agreement has been made, and no tacit agreement relative to them can be inferred, the principles laid down in the preceding chapter must be applied (*a*). With respect to the times of division and quantum to be divided at any given time, it is conceived that the majority must govern the minority where no agreement upon the subject has been come to (*b*); for these are matters of purely internal regulation, and with respect to such matters a dissentient minority have only one alternative, viz., either to give way to the majority, or, if in a position so to do, to dissolve the partnership.

[*394] ***What is divisible as profit.**—Profit is the excess of receipts over expenses (*c*); and in winding up a

(*a*) As to the mode of ascertaining profits where a person not a partner is entitled to a share of them, see *Rishton v. Grissell*, 5 Eq. 326, and 10 Eq. 393; *Geddes v. Wallace*, 2 Bli. 270.

(*b*) See *Stevens v. South Devon Rail. Co.*, 9 Ha. 326, and *Corry v. Londonderry, &c., Co.*, 29 Beav. 263, as to declaring dividends before pay-

ing debts; *Browne v. Monmouthshire, &c., Co.*, 13 Beav. 32, as to paying dividends before works are finished.

(*c*) As to the payment of income tax, see *Last v. London Ass. Corp.*, 10 App. Ca. 438; *Lawless v. Sullivan*, 6 App. Ca. 373; and where business is carried on abroad, see *Colquhoun v. Brooks*, 19 Q. B. D. 400; *Erichsen v. Last*, 8 Q. B. D. 414; *Cesena Sul-*

partnership, nothing is properly divisible as profit which does not answer this description. But for the purposes of business, and of facilitating annual divisions of profits, a distinction is made between ordinary and extraordinary receipts and expenses; and whilst all extraordinary expenses are frequently defrayed out of capital, and out of money raised by borrowing, the ordinary expenses are defrayed out of the business; and the profits divisible in any year are ascertained by comparing the ordinary receipts with the ordinary expenses of that year. It is obvious that, unless some such principle as this were had recourse to, there could be no division of profits, even of the most flourishing business, whilst any of its debts were unpaid, and any of its capital sunk. What losses and expenses ought to be treated as ordinary, and therefore payable out of current receipts, and what ought to be treated as extraordinary, and payable legitimately out of capital or money borrowed, is a question on which opinions may often honestly differ; and one which, when open to honest diversity of opinion, a majority of members can lawfully determine (*d*). But if the current receipts exceed the current expenses, the writer apprehends that the difference can be divided as profit, although the capital may be spent and not be represented by salable assets (*e*).¹

Cases where dividends have been held not improper.— Under ordinary circumstances, and in the absence of any agreement to the contrary, monies earned ought to be treated as profits of the year in which they are received and not as profits of the year in which they are earned (*f*).

* **Exclusion from share of profits.**— As will be seen [*395] hereafter, in the absence of an express agreement

phur Co. v. Nicholson, 1 Ex. D. 428; Sully v. A.-G., 5 H. & N. 711.

(*d*) See Gregory v. Patchett, 33 Beav. 595.

(*e*) As to the construction of clauses relating to payment of dividends out of profits, see Davison v. Gillies, 16 Ch. D. 347, *n.*; Dent v. London Trainways Co., ib. 344. As

to paying dividends out of capital, Bloxam v. Metropolitan Rail. Co., 3 Ch. 337; Fliteroft's case, 21 Ch. D. 519. This subject will be more fully discussed in the vol. on Companies.

(*f*) See *per* Turner, L. J., in Mac-laren v. Stainton, 3 De G. F. & J. 214. Compare Browne v. Collins, 12 Eq. 586.

¹ See Braun's Appeal, 105 Penn. St. 414; Fletcher v. Hawkins, 2 R. I. 330; Parnell v. Robinson, 53 Ga. 26; Wood v. Beath, 23 Wis. 254; Meserve v. Andrews, 106 Mass. 419; Whitcomb v. Converse, 119 id. 38.

to that effect, partners have no right to expel one of their number nor to forfeit his share (*g*).¹ Neither can they exclude him from the enjoyment of his share of profits (*h*). A partner so excluded can compel his co-partners to restore him to his rights and account to him accordingly (*i*).

(*g*) *Infra*, bk. iv. ch. 1, § 1.

(*i*) *Ib.*; and see *infra*, ch. 10, under

(*h*) *Griffith v. Paget*, 5 Ch. D. 894; the heads Account and Injunction.

Adley v. The Whitstable Co., 17 Ves.

315, 19 *ib.* 304, and 1 Mer. 107.

¹ *Ambler v. Whipple*, 20 Wall. 546, 22 L. ed. 403; *Patterson v. Silliman*, 28 Penn. St. 304; *Gorman v. Russell*, 14 Cal. 531.

*CHAPTER VIII.

[*396]

OF THE ACCOUNTS OF PARTNERSHIPS.

IN the present Chapter it is proposed to consider, (1), the mode in which partnership accounts are kept; (2), the duty of keeping and the right of inspecting the accounts of partnerships. The subject of opening settled accounts will be referred to in a subsequent Chapter.

SECTION I.—OF THE MODE OF KEEPING PARTNERSHIP ACCOUNTS.

Partnership accounts.—It is usual among mercantile men to treat all the accounts of a partnership as accounts of the firm, and to deal with the accounts of individual partners as if they were simply debtors or creditors of the firm. The property brought into the concern is credited to the stock account of the firm, and is then distributed through the ledger accounts; and in these ledger accounts the several articles and persons are made debtors to stock for the several items passed into these accounts. Each partner has his own separate account opened with the firm (usually in a private ledger), and is credited with everything he brings into it, and is debited with everything he draws out of it. Upon a rest, the net profits are determined, and are divided between the partners in the proper proportions, and the share of each partner is carried to the credit of his own separate account. The partners are creditors of the firm for all its stock, and they are debtors to it for all its deficiencies. When they first bring in their capital, the firm is in the private ledger made debtor to each of them for his proportion of capital. Whenever stock is taken, and a surplus appears, that surplus is divided according to the shares, and is carried to

*2. *A.'s Account.*

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<i>Dr.</i> to sum withdrawn,	500	0	0	<i>Cr.</i> by capital	. . .	1000	0	0
to balance	500	0	0					
	£1000	0	0			£1000	0	0

3. *B.'s Account.*

<i>Dr.</i> to balance . . .	1100	0	0	<i>Cr.</i> by capital . . .	1000	0	0
				by advance . . .	100	0	0
	£1100	0	0		£1100	0	0

4. *C.'s Account.*

<i>Dr.</i> to balance . . .	1000	0	0	<i>Cr.</i> by capital . . .	1000	0	0
	£1000	0	0		£1000	0	0

5. *Balance Sheet.*

<i>Dr.</i> to balance as above				<i>Cr.</i> by balance due as			
(from 1)	2600	0	0	above to A. . .	500	0	0
				“ B. . .	1100	0	0
				“ C. . .	1000	0	0
	£2600	0	0		£2600	0	0

Case 2.— Where there is a profit to be divided.

The accounts will then stand as under, if the profit is supposed to be 1000*l.*, and interest at 5 per cent. is charged on all sums brought in and taken out by each partner, and on his capital.

1. *Partnership Account.*

<i>Dr.</i> to stock	3000	0	0	<i>Cr.</i> by A.'s sum with-			
to interest on ditto				drawn with inter-			
one year	150	0	0	est for one year .	525	0	0
to B. for advance							
with interest for							
one year	105	0	0				
to profit. . . .	1000	0	0	by balance . . .	3730	0	0
	£4255	0	0		£4255	0	0

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* 2. *A.'s Account.*

<i>Dr.</i> to sum withdrawn		<i>Cr.</i> by capital . . .	1000	0	0
with interest for		by interest on ditto .	50	0	0
one year . . .	525	by $\frac{1}{3}$ share of profit .	333	6	8
to balance . . .	858				
	<u>£1383</u>		<u>£1383</u>		
	6		6		
	8		8		

3. *B.'s Account.*

<i>Dr.</i> to balance . . .	1488	<i>Cr.</i> by capital . . .	1000	0	0
	6	by interest on ditto .	50	0	0
	8	by advance and in-			
		terest thereon . .	105	0	0
		by $\frac{1}{3}$ share of profits,	333	6	8
	<u>£1488</u>		<u>£1488</u>		
	6		6		
	8		8		

4. *C.'s Account.*

<i>Dr.</i> to balance . . .	1383	<i>Cr.</i> by capital . . .	1000	0	0
	6	by interest on ditto .	50	0	0
	8	by $\frac{1}{3}$ share of profits,	333	6	8
	<u>£1383</u>		<u>1383</u>		
	6		6		
	8		8		

5. *Balance Sheet.*

<i>Dr.</i> to balance as above		<i>Cr.</i> by balance due as			
(from 1) . . .	3730	above to A. . . .	858	6	8
	0	“ B. . . .	1488	6	8
	0	“ C. . . .	1383	6	8
	<u>£3730</u>		<u>£3730</u>		
	0		0		
	0		0		

Case 3. — Where there is a loss to be made good.

Then if the loss is supposed to be 5000*l.*, and interest is calculated as in the last example, the accounts will stand thus:—

1. *Partnership Account.*

<i>Dr.</i> to stock . . .	3000	<i>Cr.</i> by loss . . .	5000	0	0
to interest on ditto		by A.'s sum with-			
for one year . .	150	drawn with inter-			
to B. for advance		est for one year .	525	0	0
with interest for					
one year . . .	105				
to balance . . .	2270				
	<u>£5525</u>		<u>£5525</u>		
	0		0		
	0		0		

*2. *A.'s Account.*

[*400]

<i>Dr.</i> to sum withdrawn		<i>Cr.</i> by capital . . .	1000	0	0
with interest for		by interest on ditto .	50	0	0
one year	525	by balance	1141	13	4
to $\frac{1}{3}$ share of loss .	1666				
	13				
	4				
	£2191		£2191	13	4
	13				
	4				

3. *B.'s Account.*

<i>Dr.</i> to $\frac{1}{3}$ share of loss .	1666	<i>Cr.</i> by capital . . .	1000	0	0
	13	by interest on ditto .	50	0	0
	4	by advance with in-			
		terest	105	0	0
		by balance	511	13	4
	£1666		£1666	13	4
	13				
	4				

4. *C.'s Account.*

<i>Dr.</i> to $\frac{1}{3}$ share of loss .	1666	<i>Cr.</i> by capital . . .	1000	0	0
	13	by interest on ditto .	50	0	0
	4	by balance	616	13	4
	£1666		£1666	13	4
	13				
	4				

5. *Balance Sheet.*

<i>Dr.</i> to balance due as		<i>Cr.</i> by balance as above	
above from A. .	1141	(from 1)	2270
" B. .	511		0
" C. .	616		0
	13		
	4		
	£2270		£2270
	0		0
	0		0

Effect of each partner being his own creditor or debtor. — The balances ultimately arrived at in the foregoing accounts are the sums payable — in the first two cases by the firm to the individual partners, and in the last case to the firm by them — in order to wind up the affairs of the firm. But it must not be imagined that the balances in question are debts owing to each partner by his co-partners. The balances are owing by and to the *firm*, and each partner being included in the firm is, to the extent of his share, his own debtor and his own creditor.

In what sense a partner is debtor to or creditor of the firm. — Accountants are quite right in debiting each partner in his account with the firm with the whole of whatever he draws out, and in crediting him with the whole of whatever he brings in.

[*401] * "But," as observed by Lord Cottenham, "though these terms 'debtor' and 'creditor' are so used, and sufficiently explain what is meant by the use of them, nothing can be more inconsistent with the known law of Partnership, than to consider the situation of either party as in any degree resembling the situation of those whose appellation has been so borrowed. The supposed creditor has no means of obtaining payment of his debt; and the supposed debtor is liable to no proceedings either at law or in equity — assuming always that no separate security has been taken or given (*c*). The supposed creditor's debt is due from the firm of which he is a partner: and the supposed debtor owes the money to himself in common with his partners" (*d*).

Ultimate adjustment of accounts. — The final adjustment of a partnership account frequently gives rise to questions of some difficulty. One is, whether the principles on which profits and losses have been previously ascertained are to be adhered to, or whether they are to be more or less departed from; another is, whether on a final adjustment of accounts anything can be regarded as profit or loss until the capitals of the partners have been repaid or exhausted as the case may be. In order to solve these and similar questions regard must always be had to the terms of the partnership articles; but an express agreement with *reference to the taking of accounts may be, and frequently is, only applicable to the case of a continuing partnership, and may not be intended to be observed on a final dissolution

(*c*) The remedies available by one partner against another will be examined hereafter. See, also, *ante*, p. 110.

(*d*) *Richardson v. The Bank of England*, 4 M. & Cr. 171-2. Suppose that a firm consists of three partners, A., B., and C.; that their respective capitals are a , b , c , and that they share profits and losses in proportion to those capitals. Then $a + b + c$ will be the joint capital of the three partners; and if M represents the amount of loss or gain to be shared, A.'s share of such loss or gain will be $\frac{M}{a + b + c} \times a$; B.'s share will be $\frac{M}{a + b + c} \times b$; and C.'s

share will be $\frac{M}{a + b + c} \times c$. Upon precisely the same principle, if the firm is indebted to A. in the sum a' , A. will owe himself in respect of this debt $\frac{a'}{a + b + c} \times a$; B. will owe A. $\frac{a'}{a + b + c} \times b$; and C. will owe A. $\frac{a'}{a + b + c} \times c$. So if B. is indebted to the firm in a sum b' ; B. will owe himself in respect of this debt $\frac{b'}{a + b + c} \times b$; he will owe A. $\frac{b'}{a + b + c} \times a$; and will owe C. $\frac{b'}{a + b + c} \times c$.

of the firm, or even on the retirement of one of its members (*e*). A similar observation applies to the mode in which the partners themselves have been in the habit of keeping their accounts: that which has been done for the purpose of sharing annual profits or losses is by no means necessarily a precedent to be followed when a partnership account has to be finally closed (*f*). Bearing these observations in mind, the following rules are submitted as those which ought to be followed upon a final settlement of partnership accounts, where there is nothing else to serve as a guide.

Rules to be observed.—In adjusting the accounts of partners, losses ought to be paid, first out of assets excluding capital,¹ next out of capital, and lastly by having recourse to the partners individually (*g*); and the assets of the partnership should be applied as follows:

1. In paying the debts and liabilities of the firm to non-partners;

2. In paying to each partner ratably what is due from the firm to him for advances as distinguished from capital (*h*);²

3. In paying to each partner ratably what is due from the firm to him in respect of capital;

4. The ultimate residue, if any, will then be divisible as profit between the partners in equal shares, unless the contrary can be shown.

If the assets are not sufficient to pay the debts and liabilities to non-partners, the partners must treat the difference as a loss and make it up by contributions *inter se*. If the

(*e*) See, for examples, *Lawes v. Lawes*, 9 Ch. D. 98; *London India Rubber Co.*, 5 Eq. 519; *Blisset v. Daniel*, 10 Ha. 493; *Wade v. Jennings*, 2 Giff. 509; *Wood v. Scoles*, 1 Ch. 369; and as to interest, *ante*, p. 390, note (*o*); compare *Re Barber*, 5 Ch. 687.

(*f*) For example, the value of goodwill seldom, if ever, appears in annual accounts, see *Stuart v. Glad-*

stone, 10 Ch. D. 626, 659; *Wade v. Jenkins*, 2 Giff. 509.

(*g*) See *Binney v. Mutrie*, 12 App. Ca. 160; *Crawshay v. Collins*, 2 Russ. 347, and *Richardson v. Bank of England*, 4 M. & Cr. 173.

(*h*) These come before costs of winding up, see *Potter v. Jackson*, 13 Ch. D. 845; *Austin v. Jackson*, 11 ib. 942, note.

¹ *Leach v. Leach*, 18 Pick. 68; *Young v. Clute*, 12 Nev. 31.

Where by articles an employee was to have "ten per cent. on the business," it was held that "ten per cent. on the business" meant ten per cent. of the profits of the business. *Funck v. Haskell*, 132 Mass. 580; see *Weaver v. Upton*, 7 Ired. L. 458; *Brown v. Haynes*, 6 Jones Eq. 49.

² *Hobbs v. McLean*, 117 U. S. 567, 29 L. ed. 940; *Currier v. Rowe*, 46 N. H. 72.

assets are more than sufficient to pay the debts and [*403] liabilities of the *partnership to non-partners, but are not sufficient to repay the partners their respective advances, the amount of unpaid advances ought, it is conceived, to be treated as a loss, to be met like other losses. In such a case the advances ought to be treated as a debt of the firm, but payable to one of the partners instead of to a stranger (*i*). If after paying all the debts and liabilities of the firm and the advances of the partners, there is still a surplus, but not sufficient to pay each partner his capital, the balances of capitals remaining unpaid must be treated as so many losses to be met like other losses (*k*).¹

Equality of loss and inequality of capital.—The only case which practically gives rise to difficulty, is when partners have advanced, or agreed to advance, unequal capitals and to share profits and losses equally. If nothing more than this is agreed, a deficiency of capital must be treated like any other loss; and the assets remaining after payment of all debts and advances must be distributed amongst the partners so as to make each partner's loss of capital equal; and if the assets are not sufficient, there must be such a contribution amongst the partners, or some of them, as to put all on an equality (*l*). But, if the true meaning of the partners is that all debts shall be paid out of the assets, and that any surplus assets remaining after payment of debts shall be divided between the partners in proportion to their interests therein or to their capitals, effect must be given to such an agreement, and those partners who agree to bring in most capital will lose most (*m*).

(*i*) See *Wood v. Scoles*, 1 Ch. 369.

(*k*) See the next two notes.

(*l*) *Binney v. Mutrie*, 12 App. Ca. 160. See the form of order there; see, also, *Nowell v. Nowell*, 7 Eq. 538; *Anglesea Colliery Co.*, 2 Eq.

379, and 1 Ch. 555; *Ex parte Maude*, 5 Ch. 51. Compare *Holyford Mining Co.*, Ir. Rep. 3 Eq. 208.

(*m*) *Wood v. Scoles*, 1 Ch. 369, is an instance of such a case.

¹ In *Savery v. Thurston*, 4 Ill. App. 55, A. was to furnish the capital of the firm, and have credit on the books for it. A portion having been destroyed by fire, the other partners claimed that the firm was liable only for such loss as arose from, or was incident to, the business, but it was held that the loss be borne by the firm. See *Taylor v. Coffing*, 18 Ill. 422; *Stoughton v. Lynch*, 1 Johns. Ch. 467.

* SECTION II.—OF THE DUTY TO KEEP AND THE [*404]
RIGHT TO INSPECT PARTNERSHIP ACCOUNTS.

Duty to keep proper accounts, and to allow them to be examined.—It is one of the clearest rights of every partner to have accurate accounts kept of all money transactions relating to the business of the partnership, and to have free access to all its books and accounts (*n*). So important is it to every partnership that proper accounts shall be kept and be accessible to all the partners, that whenever any written articles of the partnership are entered into, clauses are inserted for the purpose of removing whatever doubts there might otherwise be upon the subject. The usual nature and the general effect of such clauses will be adverted to in the next chapter, and the right to discovery in an action, will also be discussed hereafter. In the present place it will be sufficient to observe, that it is the duty of every partner to keep precise accounts and to have them always ready for inspection (*o*). One partner has no right to keep the partnership books in his own exclusive custody, or to remove them from the place of business of the partnership (*p*). In the absence of an express agreement to the contrary, every partner has a right, without the permission of his co-partners, to inspect, examine, and make extracts from all the books of the firm (*q*); and no partner can deprive his co-partners of this right by keeping the partnership accounts in a private book of his own, containing other matters with which they have no concern (*r*). At the same time, if a person entitled to a share of the profits of a business expressly agrees that he will accept the balance sheets prepared by others as correct, and will not investigate the books or accounts himself, he will be bound by that agreement (*s*).

(*n*) See *per* Lord Eldon in *Rowe v. Wood*, 2 Jac. & W. 558–9, and in *Goodman v. Whitecomb*, 1 ib. 593.

(*o*) *Rowe v. Wood*, 2 Jac. & W. 558. See, too, *Goodman v. Whitecomb*, 1 ib. 593, and 3 V. & B. 36.

(*p*) See *Taylor v. Davis*, 3 Beav. 388, note; *Greatrex v. Greatrex*, 1 De G. & S. 692; *Charlton v. Poulter*, 19 Ves. 148, note.

(*q*) See *Stuart v. Lord Bute*, 12

Sim. 460; *Taylor v. Rundell*, 1 Ph. 222, and 1 Y. & C. C. C. 128. This right was not enforceable at law even in an action by one partner against another, *Ward v. Apprice*, 6 Mod. 264.

(*r*) See *Freeman v. Fairlie*, 3 Mer. 43; *Toulmin v. Copland*, 3 Y. & C. Ex. 655.

(*s*) See *Turney v. Bayley*, 4 De G. J. & S. 332.

[*405] * **Effect of keeping no books or of destroying them.**

— If no books of account at all are kept, or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld, and an account is directed by a court, every presumption will be made against those to whose negligence or misconduct the non-production of proper accounts is due (*t*).¹ If all the persons interested in the account are in *pari delicto*, this rule cannot be applied; but it is the duty of continuing or surviving partners so to keep the accounts of the firm, as at any time to show the position of the firm when a change among its members occurred (*u*).

(*t*) See *Walmsley v. Walmsley*, 3 Jo. & Lat. 556; *Gray v. Haigh*, 20 Beav. 249.

(*u*) See *Ex parte Toulmin*, 1 Mer. 598, note; *Toulmin v. Copland*, 3 Y. & C. Ex. 655; and as to losing all

right to interest by keeping the accounts improperly, see *Boddam v. Ryley*, 1 Bro. C. C. 239, and 2 ib. 2; and 4 Bro. P. C. 561, noticed *ante*, p. 392.

¹ Failure to keep books renders partner liable to the strictest account of profits. *Pierce v. Scott*, 37 Ark. 308.

* CHAPTER IX.

[*406]

OF PARTNERSHIP ARTICLES.

SECTION I.—GENERAL OBSERVATIONS.

THE rights and obligations of partners *inter se*, are generally, to a certain extent, regulated by special agreement, the true meaning of which is to be ascertained by the ordinary rules of construction (a).¹

In considering the effect, however, of partnership articles, the following principles are to be borne in mind:—

1. **Partnership articles are not intended to define all the rights and duties of partners.**—In the first place, partnership articles are not intended to define, and are not construed as defining *all* the rights and obligations of the partners *inter se*. A great deal is left to be understood. The maxim *expressum facit cessare tacitum* naturally applies to partnership articles as to other agreements; but the rights and obligations of partners, so far as they are not expressly declared, are determined by general principles, which are always applicable where not clearly excluded. In the language of Lord Langdale, in *Smith v. Jeyes* (b),

(a) See Chapter X. of Story on Part.; Collyer on Part. 137, &c. See, also, the head Partnership in Jarman and Bythewood's Conveyancing and Davidson's Conveyancing.

(b) 4 Beav. 505. See, too, *Nelson v. Bealby*, 30 Beav. 472, and *Browning v. Browning*, 31 Beav. 316, as to the non-application of the maxim *expressio unius est exclusio alterius*.

¹ No articles necessary if to take effect immediately. *Smith v. Tarlton*, 2 Barb. Ch. 336.

Conditional partnership not annulled unless it is a condition precedent. *Murray v. Johnson*, 1 Head, 353.

Where any part of its stock is to consist of real estate a particular partnership must be in writing. *Dunbar v. Bullard*, 2 La. Ann. 810.

Articles may provide that as between themselves one of the partners shall not be liable for debts of the firm. *Pollard v. Stanton*, 7 Ala. 761; *Consolidated Bank v. State*, 5 La. Ann. 44.

“The transactions of partners with each other cannot be considered merely with reference to the express contract between them. The duties and obligations arising from the relation between the parties are regulated by the express contract between them, so far as the express contract extends and continues in force; but if the express contract, or so much of it as continues in force, does not reach to all those duties and obligations, they are implied and enforced by the law; and it is often matter to be collected and inferred from the conduct and practice of the parties, whether they have held themselves, or ought or ought not to be [*407] held, bound by the particular *provisions contained in their express agreement. When it is insisted that the conduct of one partner entitles the other to a dissolution, we must consider not merely the specific terms of the express contract, but also the duties and obligations which are implied in every partnership contract” (c).

2. Articles to be construed with reference to the objects of the partners. — The attainment of the objects which the partners have declared they had in view is always regarded as of the first importance. All the provisions of the articles are to be construed so as to advance and not to defeat those objects; and however general the language of partnership articles may be, they will be construed with reference to the end designed, and, if necessary, receive a restrictive interpretation accordingly (d). This rule is of especial importance in considering the limits of general powers conferred on committees, directors, and other. For example, in *Chapple v. Cadell* (e) the proprietors of a newspaper entrusted the management of the paper to a committee of five, and gave them power to call general meetings, and agreed that the resolutions of the majority present at such meetings should be binding on all the proprietors. A meeting was convened, and the majority present resolved that the paper and the shares of all the proprietors in it should be sold by auction. But it was held that the majority had no power to sell the shares of a dissentient and protesting minority.

Other illustrations of the same principle will be found in Bk. III., c. 2, § 3, which treats of the powers of majorities.

Conformably with the same rule,

3. Articles to be construed so as to defeat fraud; and the taking of unfair advantages. — Any provision, however worded, will, if possible, be construed so as to defeat any attempt by one partner to avail himself of it for the purpose of defraud-

(c) See, too, *Blisset v. Daniel*, 10 Ha. 522.

(d) See Coll. on Part. 137.

(e) *Jac.* 537.

ing his co-partner. Thus it is very common for partners to agree that half-yearly accounts shall be made out and signed, and not be afterwards disputed; but, notwithstanding such a clause, if one partner knowingly makes out a false account, and his co-partners sign it upon the faith that it is correct, they will not be bound by it (*f*). Again, it is by no means unusual for partners to agree that yearly accounts shall be taken, and that, in the case of the death of a partner, his representatives shall be paid his share *as appear- [*408] ing in the last account, with interest instead of subsequent profits; but if the partners do not for several years make out any accounts, and then one of them dies, the survivors are not entitled to act on the letter of the agreement, and pay only the amount which in the last account was carried to the credit of the deceased, with interest on such amount (*g*).

4. Every power conferred by the articles on any individual partner, or on any number of partners, is deemed to be conferred with a view to the benefit of the whole concern; and an abuse of such power, by an exercise of it, warranted perhaps by the words conferring it, but not by the truth and honour of the articles, will not be countenanced. Thus, in a case which has been already frequently referred to (*h*), a power to expel any partner was vested in the holders of two-thirds of the shares in the firm; but it was held that, although this power was so framed that it might be exercised without any reason being assigned, it could not be put in force for the unfair purpose of obtaining the share of the expelled partner at less than its value.

Provisions may be waived by tacit agreement.—Any article, however express, is capable of being abandoned by the consent of *all* the partners; and this consent may be evidenced, not only by express words, but by conduct (*i*).

The maxim *módus et conventio vincunt legem* is especially applicable to cases of this description. In the language of Lord Eldon,

(*f*) See *Oldaker v. Lavender*, 6 Sim. 239.

(*g*) *Pettyt v. Janeson*, 6 Madd. 146.

(*h*) *Blisset v. Daniel*, 10 Ha. 493.

See, also, *Wood v. Wood*, L. R. 9 Ex. 190.

(*i*) This rule appears to be of comparatively modern date; it was not acted on in *Smith v. The Duke of Chandos*, Barn. 419.

"In ordinary partnerships nothing is more clear than this, that although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership the parties agree that no one of them shall draw or accept bills of exchange in his own name, without the concurrence of all the others, yet, if they afterwards slide into a habit of permitting one of them to draw or accept bills without the concurrence of the others, this *Court will hold that they have varied the terms of the original agreement in that respect" (*k*).

Examples.—This principle was acted on by Lord Eldon in a case where the partners had agreed that annual accounts should be taken, and that in case of the death of a partner, his representatives should be paid an allowance instead of profits; for it appeared that for some years no accounts had been taken, and that the partners had engaged in transactions of such a nature, that it would have been unfair to have applied the original agreement (*l*). So a practice treating losses as bad when discovered so to be, was held to apply as between the executors of a deceased partner and the surviving partners, although the effect was to give the executors much more than they would otherwise have been entitled to (*m*). So, where articles contained a stipulation that the partners should contribute to losses and share profits in a certain proportion, and it appeared that a person who managed the affairs of the firm had always received a share of the profits, but had never been called upon to contribute to losses, it was held, that assuming him to be a partner in the proper sense of the term, and to have been originally bound by the articles to contribute to losses, the articles, so far as they obliged him so to contribute, had been varied by the conduct of the parties, and were no longer binding on him (*n*).

Varying articles.—If it is proposed to make an alteration

(*k*) *Const v. Harris*, T. & R. 523. See, also, *Coventry v. Barclay*, 33 Beav. 1, and on app. 3 De G. J. & Sm. 320; *Pilling v. Pilling*, 3 De G. J. & Sm. 162; *England v. Curling*, 8 Beav. 133 and 137; *Somes v. Currie*, 1 K. & J. 605, and the cases in the next three notes.

(*l*) See *Jackson v. Sedgwick*, 1 Swanst. 460; *Pet'yt v. Jancson*, 6 Madd. 146; *Simmons v. Leonard*, 3 Ha. 581. Compare *Lawes v. Lawes*, 9 Ch. D. 98, where the day for making up the accounts had been altered.

(*m*) *Ex parte Barber*, 5 Ch. 687.

(*n*) *Geddes v. Wallace*, 2 Bli. 270.

in the articles by an agreement which shall be binding on all parties, notice of the proposed change and of the time and place at which it is to be taken into consideration, ought to be given to all the partners (*o*).¹ For, even if the change is one which it is competent for a majority to make against the assent of the minority, all are *entitled [*410] to be heard upon the subject: and unless all have an opportunity of opposing the change, those who object to it will not be bound by the others (*p*).¹

Reverting to original rules.—It seems that a person who comes into a firm through another who has acquiesced in a variation of the terms of the partnership articles, is bound by that acquiescence, and cannot revert to the original articles (*q*); and this principle has been applied to companies (*r*).

6. Original articles apply to partnership continued under them.—The last general rule which it is necessary to notice is this: if a partnership, originally entered into for a definite time, is continued after the expiration of that time, without any new agreement, the articles under which the partnership was first carried on continue, so far as they are applicable to a partnership at will, to regulate the rights and obligations of the partners *inter se* (*s*).² Thus, in *King v. Chuck* (*t*), three partners, A., B., C., agreed that if either of them should die, his capital, as appearing by the last account, should be paid to his representatives by the surviving partners, on whom the trade was then to devolve. A. died, and this agreement was acted on, and B. and C. continued in partnership without coming to any fresh agreement. Then B. died, and it was

(*o*) See *Const v. Harris*, T. & R. 524.

(*p*) *Ib.* 525; see, also, *ib.* 518.

(*q*) See *Const v. Harris*, T. & R. 524.

(*r*) *Ffooks v. South-Western Rail. Co.*, 1 Sm. & G. 142; *Peek v. Gurney*, 13 Eq. 79.

(*s*) See *Neilson v. Mossend Iron*

Co., 11 App. Ca. 298, where a new agreement was contemplated, but not concluded; *Crawshay v. Collins*, 15 Ves. 228; *Featherstonhaugh v. Fenwick*, 17 Ves. 307; *Booth v. Parkes*, 1 Molloy, 465.

(*t*) 17 Beav. 325.

¹ A tacit understanding not admitted to modify articles of partnership. *Thomas v. Lines*, 83 N. C. 191. *Contra*, *Robbins v. Laswell*, 27 Ill. 365. Partners may modify, alter, or dissolve the co-partnership contract, as between themselves, either wholly or in part. *Solomon v. Solomon*, 2 Ga. 18.

² If agreement altered, dissenting partners may withdraw. *Abbott v. Johnson*, 32 N. H. 9.

³ *Sangston v. Hack*, 52 Md. 173; *Whitehead v. Howard*, 2 Russell & C. 423 (N. S.); *Troutbeck v. Richardson*, New Zea. App. 80; *Evans v. Guthridge*, 1 W. W. & A'B. Eq. 119 (Victoria).

held that B. and C. had in fact continued in partnership on the old terms, and that B.'s executors were therefore to be paid the amount appearing to be his capital in the last account come to between him and C.

Provisions applicable during the term of partnership.— Even where a partnership is entered into for a term of years, and the articles provide for events happening *during the term*, or *during the partnership*, the above rule has been still applied. Thus, where two persons agreed to become partners for fourteen years, and stipulated that if either died *during this co-partnership term*, his share should be taken by the other at a certain sum, and the fourteen years expired, and the two persons continued in partnership together without [*411] coming to *any fresh agreement, and then one of them died: it was held that the above stipulation was binding, and that the share of the deceased belonged to the survivor upon payment of the sum mentioned (*u*). The expression, “the partnership term,” was held equivalent to the time during which the partners continue in partnership without coming to any fresh agreement.

But the authorities on this head are not uniform (*x*). In their present state it is doubtful whether a clause giving a right of pre-emption is one of those which is operative after the termination of the partnership originally contemplated, unless the articles are clear upon the subject (*y*). A right of expulsion has been held not to apply to a partnership continued after the expiration of the time for which it was originally entered into (*z*). But an arbitration clause has been held to apply (*a*).

SECTION II.—ON THE USUAL CLAUSES IN ARTICLES OF PARTNERSHIP.

Usual clauses in partnership articles.— Having now alluded to the more important general rules which require to be

(*u*) *Essex v. Essex*, 20 Beav. 442; *Cox v. Willoughby*, 12 Ch. D. 863.

(*x*) Compare the two last cases with *Yates v. Finn*, 13 Ch. D. 839, and *Cookson v. Cookson*, 8 Sim. 529.

(*y*) See the two last notes. *Yates v. Finn* was not referred to in *Wil-*

loughby v. Cox, but the former case is very shortly reported on this point.

(*z*) *Clark v. Leach*, 32 Beav. 14, and 1 De G. J. & Sm. 409. See *Neilson v. Mossend Iron Co.*, 11 App. Ca. 298.

(*a*) *Gillett v. Thornton*, 19 Eq. 599.

borne in mind in considering the effect of special agreements between partners, it is proposed to notice shortly the provisions usually met with in partnership articles, and the interpretation which has been put upon them by the courts.

In framing articles of partnership, it should always be remembered, that they are intended for the guidance of persons who are not lawyers; and that it is therefore unwise to insert only such provisions as are necessary to exclude the application of rules which apply where nothing to the contrary is said. The articles should be so drawn as to be a code of directions, * to which the partners may refer [*412] as a guide in all their transactions, and upon which they may settle among themselves differences which may arise, without having recourse to Courts of Justice.

1. **The nature of the business** should always be stated. Upon it depends the extent to which each partner is to be regarded as the implied agent of the firm in his dealings with strangers; and upon it also in a great measure depends the power of a majority of partners to act in opposition to the wishes of the minority (*b*).

The place of business should also be stated; and if the place is held on lease which will expire during the partnership, provision should be made for the renewal of the lease, or for the acquisition of another place of business. Otherwise the business may come to a premature end (*c*).

2. **The time of the commencement of a partnership.** — *Primâ facie*, articles of partnership, like other instruments, take effect from their date; and if they are executed on the day of their date, and contain no expression indicating when the partnership is to begin, it must be taken to commence on the day of the date of the articles, and parol evidence to show that this was not intended is not admissible (*d*).¹

(*b*) See *ante*, p. 313 *et seq.*

(*c*) See *Clements v. Norris*, 8 Ch. D. 129, where the business was to be carried on at a particular place, or such other place as the partners might agree upon, and they disagreed.

(*d*) *Williams v. Jones*, 5 B. & C. 108. If the articles are not dated, parol evidence is admissible to show that they were not to take effect from the time of their execution. See *Davis v. Jones*, 17 C. B. 625.

¹ Where the articles clearly indicate a purpose that they shall take effect immediately, the failure of one of the partners to pay in his share of the capital, as agreed, does not render him any less a partner as of the date of the execution of the articles. *Southern White Lead Co. v. Haas*, 33 N. W. Rep. 657 (Iowa); *Kerrick v. Stevens*, 55 Mich. 167.

Retrospective and prospective partnership. — It occasionally happens that it is expressly declared by the partnership articles that the partnership is to date from a specified time, either prior or subsequent to the day on which the articles are executed. The effects of such a declaration, as between the parties to the articles, and as between them on the one hand, and third persons on the other, are by no means the same. As between the parties themselves the time specified is that from which the accounts of profits and losses are to date; but as between those parties and third persons the time in question is of little if any importance: for an agreement

that a partnership shall date from a time past does [*413] not *enure to the benefit of creditors (*e*); and an

agreement that it shall date from a time future does not prejudice them, if, in fact, the parties act as partners before such time arrives (*f*).

Formal contract to be drawn up. — It occasionally happens that an agreement for a partnership is drawn up and signed, but a more formal instrument is intended to be executed. If in a case of this sort the execution of the formal instrument is delayed, the commencement of the partnership is not necessarily delayed also. Whether it is or is not must depend on the terms of the preliminary agreement; for by that agreement the parties are bound, and its terms will regulate their rights and obligations *inter se*, so long as the more formal instrument is unexecuted (*g*).^{*}

3. **The name or style of the firm** should be expressed; and it should be declared that no partner shall enter into an engagement on behalf of the firm except in its name.¹ Such an agreement is capable of being enforced (*h*): and it may be of use in determining, as between the partners, whether a given transaction is to be regarded as a partnership transaction or not.

4. **The duration of the partnership.** — If the time for which

(*e*) Vere v. Ashby, 10 B. & C. 288.

(*g*) See England v. Curling, 8

(*f*) Battley v. Lewis, 1 Man. & Gr. 155.

Beav. 133.

(*h*) See Marshall v. Colman, 2 J. & W. 268.

¹ Firm name need not be agreed upon in articles. If a certain name is used, the firm is bound by it. Pursley v. Ramsey, 31 Ga. 403. See Le Roy v. Johnson, 2 Pet. 186, 7 L. ed. 191; Winship v. Bank of United States, 5 Pet. 529, 8 L. ed. 216.

the partnership is to endure is not limited to a definite period, either expressly or by necessary implication, the partnership may be dissolved at the will of any partner (*i*). But it must not be forgotten that a partnership entered into for a definite time is dissolved by the death or bankruptcy of any one of its members before that time has expired (*k*), and that it is therefore necessary to provide for these events in order to give effect to the agreement as to time.

A partnership entered into for a certain time, and continued after that time has expired, is a partnership at will (*l*).²

5. **The premium.** — The points to be attended to with reference to this, are, 1, when, to whom, and how it is to be paid; and, 2, whether the whole or any part of it is to be returned in *any and what events. The law relating [*414] to this subject has been already noticed (*m*).

6. **The capital and property of the firm.** — The articles should always carefully specify what is and what is not to be considered partnership property; particularly where one partner is, or is to be, solely entitled to what is to be used for the common purposes of all.¹ If one partner is entitled to

(*i*) *Infra*, book iv. ch. 1, § 1.

(*k*) *Ibid*.

(*l*) *Featherstonhaugh v. Fenwick*,
17 Ves. 307; *Neilson v. Mossend Iron*

Co., 11 App. Ca. 298, and *infra*, book
iv. ch. 1, § 1.

(*m*) *Ante*, p. 64, *et seq.*

² Where extension of partnership is made during the term, it cannot be considered as the creation of a new partnership. *Arnold v. Danziger*, 30 Fed. Rep. 898; continuance after term supposed to be on same terms and conditions as during original term. *Bradley v. Chamberlain*, 16 Vt. 613; *Mifflin v. Smith*, 17 S. & R. 165. But where articles under seal authorized each partner to bind the firm by deed, a continuation not under seal does not carry with it that power, and a mortgage by one partner does not bind the other members. *Napier v. Catron*, 2 Humph. 534.

¹ Articles provided that "A. puts into the concern 660 tons of ice now at X's ice-house, and sells to said B. one span of horses . . . in which ice said B. is to be an equal partner." Held, not to make B. a partner in all the ice in X's ice-house, but to be a representation that there were 660 tons of ice there, and an agreement to put that amount into the partnership. *Sexton v. Lamb*, 27 Kan. 426.

A. & B. entered into partnership, to which A. contributed money, and B. machinery at a specified value. It was agreed that upon dissolution the assets should be distributed by repaying to each the amount of the capital contributed by him, and dividing the balance equally, and B. agreed to receive the machinery contributed by him at the same value that it represented in the capital stock. On dissolution A. took the machinery, and in an action for an account, it was charged to him at its actual value at the time of dissolution. *Weldon v. Beckel*, 10 Daly (N. Y.), 472.

land which is to become partnership property, it is usual (in order to prevent a sale to a person for value without notice), to have that land conveyed or assigned to trustees for the firm: but, as between the partners themselves, all that is requisite is to declare in the articles that the land shall form part of the assets of the firm. It is also prudent to declare that, as between the real and personal representatives of any deceased partner, his share shall be deemed personal estate. It should be declared that apprentice fees and other casual payments belong to the firm, and form part of its profits.

If the firm is to spend money on the separate property of one of the partners, the right of the firm to a lien for its outlay should be expressly stipulated for or expressly excluded (*n*).

Official appointments.—A kind of property which is difficult to deal with, and which should always be made the subject of an express agreement, is the benefit accruing from an office or appointment obtained by one of the partners.²

(*n*) *Ante*, pp. 330 and 384.

And where one contributed money and the other a patent, and the owner of the patent granted an exclusive right to sell under the patent, the other was held entitled to one-half the royalty. *Norris v. Rogers*, 107 Ill. 148. See *Jones v. Butler*, 87 N. Y. 613; *aff.* 23 Hun. 367.

While, in general, a partnership imports a communion of profits and losses among its several members as between themselves, a disproportionate interest in profits and losses may be agreed upon, and if the articles fairly bear this construction it will be enforced. *Welsh v. Canfield*, 60 Md. 469.

In *Adams v. Gordon*, 98 Ill. 598, the articles provided that two partners with a nominal stock of \$20,000 should share equally in all stock profits and losses, and that upon final settlement everything should be equally divided. During five years neither was credited with an excess of capital, nor was any charge made to either. Upon the death of one it was held that nothing warranted a settlement on the basis of the original nominal stock. See *Jones v. Butler*, 23 Hun. 367; *Fulmer's Appeal*, 90 Penn. St. 143; *Conroy v. Campbell*, 45 N. Y. Super. Ct. 326; *Schulte v. Anderson*, 45 N. Y. Super. Ct. 489.

In *Hayes v. Fish*, 36 Ohio St. 498, A. sold to four persons four-fifths of quarry lands for \$10,000, and entered into partnership with them in quarrying stone on the lands, for the purpose of realizing the purchase money, with an agreement that, after defraying the expenses of the business, the balance of profits to be applied to said \$10,000, and thereafter to share profits equally, and have an equal interest in the lands and all property of the firm. Held, that the net profits to amount of \$10,000, including A.'s share, were appropriated to the purchase money, and to reimburse any part thereof paid with other means, and no part of the purchase money to be remitted by A. on account of deficiency of profits.

² Where articles allowed partner to hold office with the consent of his co-partners, it was held that the individual partner alone was entitled to the income of such office. *Starr v. Case*, 59 Iowa, 491.

For example, in the case of a firm of solicitors, one of them may be a clerk to some turnpike trust, or to a poor law board, or he may hold some other appointment yielding a salary. Care should always be taken to specify whether the salary is to belong solely to the partner holding the appointment, or whether it is to form part of the partnership assets (*o*); and if the latter, provision should be made for the payment of a sum by the partner holding the appointment in the event of the dissolution of the firm, whilst the appointment continues. If the profits of the office are * partnership assets, and the firm is dissolved whilst [*415] the office is held by one of its members, the Court in winding up the partnership, will leave him in the enjoyment of the office, but charge him with its value in his account with the firm (*p*).

Trade secrets, patents, &c. — When a partnership is formed for working some secret and unpatented invention, the articles should specify to whom exclusively the right of working such invention shall belong in the event of dissolution. For if there be no agreement on the subject, all the parties will have a right to work it, in opposition to each other, there being no ground upon which any of them can be prevented from so doing. If, however, it can be proved by the inventor that his secret was to be kept from his co-partners, or that they, if they discovered it, were not to make use of their discovery, they will not be allowed to violate the agreement into which they have entered, or the trust reposed in them; and the circumstance that the invention has not been patented will not be material (*q*).

Good-will. — *Good-will* is a kind of property which ought also to be expressly provided for; but this is most conveniently done in connection with the dissolution clauses (*r*).

Contributions of capital. — The proportions in which the capital is to be contributed by the partners, and the proportions in which they are to be entitled to it when contributed, ought also to be carefully expressed. It by no means follows that the partners are to be entitled to the assets in the

(*o*) See *Collins v. Jackson*, 31 Beav. 645, noticed *ante*, p. 331, where profits arising from appointments of this sort were held to belong to the partnership, although *primâ facie* they do not.

(*p*) See *Smith v. Mules*, 9 Ha. 556; *Ambler v. Bolton*, 14 Eq. 427.

(*q*) See *Morison v. Moat*, 9 Ha. 241.

(*r*) See as to this, *infra*.

proportions in which they contribute to the capital. Indeed, if no express declaration upon the subject is made, the *primâ facie* inference is, that all the partners are entitled to share the assets (minus the capital) equally, although they may have contributed to the capital unequally (*s*).

Capital should be money.—The capital should be expressed to be so much money; and if one of the partners is to contribute lands or goods instead of money, such lands or goods should have a value set upon them, and their value in money should be considered as his contribution. If this be [*416] not done, the articles and accounts *and the proportions in which profits and losses are to be shared will be less perspicuous and free from doubt than will otherwise be the case; and the partner who contributes land will generally be inclined to look upon such land as his, and not as part of the common stock.

Rules as to conditions precedent.—When the articles provide that each partner shall bring in so much capital, or do some other specified thing, the question sometimes arises how far the fulfilment by each of his obligations is a condition precedent to his right to call for fulfilment by the others of their obligations. The rules laid down in the well-known note to *Pordage v. Cole* (*t*), must be applied to all such cases. These rules are as follows:—

“1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent; and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act.

“2. When a day is appointed for the payment of money, &c., and the day *is* to happen *after* the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., *before* performance.

“3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration.

“4. But where the mutual covenants go to the *whole consideration* on

(*s*) *Ante*, pp. 348 *et seq.*, and 402-3.

(*t*) 1 Wms. Saund. 320, *a*.

both sides, they are mutual conditions, and the performance must be averred.

"5. Where two acts are to be done at *the same time*, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay a sum of money on the *same day*, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale."

In conformity with these rules, it was held, in *Stavers v. Curling* (*u*), that the plaintiff who had covenanted to proceed on a whaling voyage, and to obey the instructions of the *defendants, but who had not obeyed [*417] them, could nevertheless maintain an action against them for the share of the profits which they had covenanted to pay him, although they had only covenanted to pay him on the performance by him of his covenants.

So in *Kemble v. Mills* (*x*), where two persons had agreed to become partners, and one of them was to bring in 2000*l.*, and do certain things, and the other was to bring in 5000*l.*, it was held that an action lay for non-payment of the 5000*l.*, although the plaintiff did not state that he had brought in his 2000*l.*, or had done any other of the acts which he had agreed to do.

Bringing in so much in good debts.—Capital is sometimes agreed to be brought in in the shape of good debts. Where, on the formation of a partnership, it was agreed that one of the partners should bring in 40,000*l.* of good debts, and that sum was owing to him by persons who continued customers of the firm after its formation, and became indebted to it, and who in time paid it 40,000*l.* and more, it was held that this sum had been brought in as agreed. For nothing having been said as to the accounts on which the payments were made, and each customer's account having been kept in such a way as to form one single continuous account, the 40,000*l.* was treated as having been paid in discharge of the earliest items in their respective accounts; or, in other words, in discharge of the debts owing to the partner who undertook to bring in that amount of good debts, and not in discharge of the subsequent debts contracted with the firm (*y*).

(*u*) 3 Bing. N. C. 355.

(*y*) *Toulmin v. Copland*, 2 Cl. &

(*x*) *Kemble v. Mills*, 9 Dowl. 446.

Fin. 681; s. c. 3 Y. & C. Ex. 636.

Compare *Marsden v. Moore*, 4 H. & N. 500.

In *Cooke v. Benbow*, a father, who was in business, took his sons into partnership, and agreed to bring into the business all the capital, plant, and stock in trade then and usually employed by him in the business. In estimating the capital, the book debts due to the father were valued at twenty per cent. below their nominal amount, but they, in fact, realized more; and it was held that the surplus [*418] constituted part of the father's capital, and not part of the profits of the partnership (z).

Guarantee against debts.—When a person is about to enter a firm, he sometimes requires a guarantee that its debts do not exceed a certain sum. If such a guarantee is given, and it turns out that the debts of the firm exceeded the sum mentioned at the time in question, the guarantor is liable to an action: and the amount of damages which the plaintiff is entitled to recover is the loss he has sustained in consequence of the excess of debts above the sum mentioned; but not the loss he may have suffered by having joined the firm (a).

7. Interest, allowances, &c.—The allowance of interest on capital and on advances should be made the subject of special agreement. The interest should be made payable before the profits to be divided are ascertained, and the interests on advances should be made payable before interest on capital (b).

Monies to be drawn out.—Most articles of partnership contain a clause authorising each partner to draw out of the partnership funds a certain sum per month for his own private purposes. Such a clause should provide for the repayment with interest of whatever may be drawn out in excess of the sum mentioned.

Expenses to be charged to the firm.—The articles should also specify what expenses are to be borne by the firm;¹ and particular notice should be taken of allowances of an unusual kind, but which the partners may intend shall be

(z) *Cooke v. Benbow*, 3 De G. J. & Sm. 1.

(a) *Walker v. Broadhurst*, 8 Ex. 889.

(b) See, as to interest, when there is no agreement to allow it, *ante*, p. 389.

¹ Provision that each shall pay his expenses, means when at home, and not when travelling on firm's business. *Withers v. Withers*, 5 Pet. 355; see *Foster v. Goddard*, 1 Black. 596.

made, *e.g.*, an allowance for treating customers, for management, for rent, maintenance of servants, &c., &c. (*c*).

8. Conduct and powers of the partners.—It is the practice to insert in partnership articles an express covenant by each partner to be true and just in all his dealings with the others. This, however, is always implied; and the clause in question is of little use in a legal point of view, although it may serve to remind the partners of their mutual obligations to good faith.

The effect of the clause in creating a specialty debt is very *limited. In *Powdrell v. Jones* (*d*) two [*419] partners covenanted that they respectively would be true and just to each other in all their contracts, reckonings, receipts, payments, and dealings; and each bound himself to the other in the penal sum of 5000*l.* for the due performance of the covenants in the articles. One of the partners became greatly indebted to the firm in respect of receipts by him on its account. It was contended that the debt was a specialty debt by reason of the covenant above referred to; but it was held that the debt was only a specialty debt to the extent of 5000*l.*, the amount of the penalty in which each partner was bound to the other, and that the residue of the debt was a simple contract debt only.

Hiring servants, &c.—It is useful to state who is to have the power of hiring and dismissing servants (*e*).

Amount of attention to be given to the affairs of the firm.—The time and attention which the partners are to give to the affairs of the firm should be expressly mentioned; especially if one of them is to be at liberty to give less of his time and attention than the others. Inattention to business by reason of illness is, however, no breach of an agreement to attend to it (*f*).

Stipulations that one partner shall not do certain things without the consent of the others.—It is usual to insert in partnership articles a clause prohibiting any partner from doing certain things without previously obtaining the consent of the others; *e.g.*, becoming surety, releasing debts, speculating in the funds, drawing, accepting, or indorsing bills, otherwise than in the usual course of business, &c., &c.

(*c*) *Ante*, p. 383.

(*e*) See *ante*, p. 313.

(*d*) *Powdrell v. Jones*, 2 Sm. & G. 305.

(*f*) *Boast v. Firth*, L. R. 4. C. P. 1; *Robinson v. Davison*, L. R. 6 Ex. 269.

Agreement not to carry on any other business.—An agreement not to carry on any other business is binding and can be enforced; but a breach of it does not necessarily involve a liability to account to the firm for the profits derived from the business carried on in violation of the agreement (*g*).

Majority.—If the number of partners exceeds two, the majority should be expressly entrusted with the power of deciding what shall be done as regards any matter in dispute between the partners, and relating to the business [*420] of the partnership, as *defined by the articles (*h*).

It is difficult to lay down a general rule for the determination of what is to be done if the partners are equally divided. Articles of partnership, as usually drawn, are silent upon this question; but if it were declared that in such a case matters should be left in *statu quo*, probably some little assistance would be given to the preservation of peace and good will.

9. **Partnership books.**—In order to prevent any disputes as to the custody of the partnership books, it is advisable to declare that they shall be kept at the office of the partnership, and that each partner shall have free access to them. A Court will restrain the removal or detention of the partnership books contrary to an express agreement entered into by the partners (*i*); and even in the absence of any special agreement, the Court would probably interfere, for it is an implied obligation on the part of every partner not to exclude his co-partners from access to the books of the firm (*k*).

10. **Accounts.**—The object of taking partnership accounts is two-fold, viz., 1. To show how the firm stands as regards strangers; and 2. To show how each partner stands towards the firm. The accounts, therefore, which the articles should require to be taken, should be such as will accomplish this two-fold object. The articles should consequently provide, not only for the keeping of proper books of account, and for the due entry therein of all receipts and payments, but also

(*g*) *Dean v. Macdowell*, 8 Ch. D. 345, and see *ante*, book iii. ch. 2, § 2.

(*h*) See as to the powers of a majority, *ante*, p. 313 *et seq.*, and *Falkland v. Cheney*, 5 Bro. P. C. 476, which turned on the wording of the articles.

(*i*) See *Taylor v. Davis*, 3 Beav. 388, note; *Greatrex v. Greatrex*, 1 De G. & Sm. 692.

(*k*) In *Greatrex v. Greatrex*, 1 De G. & Sm. 692, it does not appear whether any express agreement as to the custody of the books had been entered into or not.

for the making up yearly of a general account, showing the then assets and liabilities of the firm, and what is due to each partner in respect of his capital and share of profits, or what is due from him to the firm, as the case may be.

Accounts agreed to not to be re-opened.—In order, moreover, to prevent accounts which have been once fairly taken and settled from being afterwards disputed, the articles usually declare that an account when signed shall be treated as conclusive; or not be opened except for some *manifest error discovered within a given time. A [*421] provision to this effect is extremely useful, and should never be omitted (*l*);¹ but however stringently it may be drawn, no account will be binding on any partner who may have been induced to sign it by false and fraudulent representations, or in ignorance of material circumstances dishonourably concealed from him by his co-partners (*m*). Where, however, all parties act *boni fide* such clauses are operative; but the usual provision as to manifest errors applies only to errors in figures and obvious blunders, not to errors in judgment, *e.g.*, in treating as good, debts which ultimately turn out to be bad, or in omitting losses not known to have occurred (*n*). All errors are manifest when discovered; but such clauses as those here alluded to are intended to be confined to oversights and blunders, so obvious as to admit of no difference of opinion.

Accounts conclusive for one purpose but not for another.—Moreover, an account may be conclusive for one purpose, although not for another, *e.g.*, for the purpose of calculating the profits to be divided so long as the firm is unchanged, but not for calculating the total amount to be paid to a partner on his expulsion from the firm (*o*).

So, from the fact that nothing is reckoned for good-will in taking annual accounts with a view to a division of profits, it does not follow that the good-will is not to be reckoned on a dissolution of the partnership by the death or retirement of

(*l*) See the obs. of V.-C. Bacon in London Financial Ass. v. Kelk, 26 Ch. D. 151.

(*m*) See Oldaker v. Lavender, 6 Sim. 239; Blisset v. Daniel, 10 Ha. 493.

(*n*) See *Ex parte Barber*, 5 Ch.

687; Laing v. Campbell, 36 Beav. 3, where, however, there were no articles.

(*o*) *Ante*, pp. 401, 402; Blisset v. Daniel, 10 Ha. 493. Compare Coventry v. Barclay, *infra*.

¹ Smith v. Knarston, 3 Australian J. R. 94 (Victoria).

a partner (*p*). Nor does it follow that because profits and losses are annually divided equally, the losses on a final winding up are to be divided equally, without reference to the capitals of the partners (*q*).

A most important and instructive case on this subject is *Coventry v. Barclay* (*r*). There it was provided that [*422] accounts *should be taken and signed yearly, and not be afterwards disputed, and that on the death of a partner the survivors should be at liberty to take his share at its value, according to the last annual account preceding his death. The partners were accustomed in their annual accounts to put a nominal value on their plant and stock in trade, and to carry over a portion of their profits to a separate account, in order to form a reserve fund to answer unforeseen losses. Shortly before the death of one of the partners, the others *bonâ fide* made up an annual account in the usual way, and sent him a copy of it, which he never signed, but never in any way disapproved. It was held (both by Lord Romilly and Lord Westbury) that the executors of the deceased partner were bound by the nominal valuation of the stock, &c., but (by Lord Westbury, reversing the decision below) that they were entitled to a share of the surplus of the reserve fund after paying the losses, &c., to meet which it was created.

Accounts not signed. — The accounts having, in this case, been taken *bonâ fide* and in the usual way, and no errors being suggested, the absence of the deceased partner's signature was treated as of no importance, for he could not properly have refused to sign them (*s*).

11. **Retiring.** — In the absence of a special provision enabling a partner to retire, there is no method by which he can do so without a general dissolution and winding up of the firm; unless, of course, some agreement can be made between all the partners at the time of retirement. Moreover, as will be seen hereafter (*t*), a partnership which has been entered into for a definite time, cannot be dissolved at the will of any member. It is obviously, therefore, in many

(*p*) *Wade v. Jenkins*, 2 Giff. 509.
Compare *Steuart v. Gladstone*, 10 Ch. D. 626.

(*q*) *Binney v. Mutrie*, 12 App. Ca. 160; *Wood v. Scoles*, 1 Ch. 369.

(*r*) 33 Beav. 1, and on appeal, 3 De G. J. & Sm. 320. See, also, *Ex parte Barber*, 5 Ch. 687.

(*s*) The same thing occurred in *Ex parte Barber*, 5 Ch. 687.

(*t*) Book iv. ch. 1, § 1.

cases necessary to insert in the articles a special clause enabling a partner to retire, and defining the terms on which, as between himself and co-partners, he is to be at liberty so to do (*u*).

Power to sell share. — If it is provided that a partner may sell his share, and no restrictions are mentioned, he may sell to any one he likes, even to a pauper; and on giving his co-partners notice of his withdrawal from the firm, he will cease to be a member thereof as between himself and them; even although the purchaser *from him does [*423] not come forward and take his place as a partner in the firm (*x*).

Co-partners to have refusal of share. — It is sometimes declared that a partner who is desirous of retiring shall offer his share to his co-partners before selling it to any one else.

In a recent Scotch case a clause of this kind was held not to preclude one of the continuing partners from buying for himself the share of the outgoing partner (*y*).

In *Homfray v. Fothergill* (*z*), the articles provided that the offer should be made first to the other partners collectively; and if they should decline, then to those desirous of collectively purchasing; and if none such, then to the partners individually. It was held that an offer by one partner to all the others was equivalent to an offer to all of them, and also to such of them as might be desirous of buying, and that one of them having declined to buy, the others were at liberty to do so, although no fresh offer to sell to them had been made, and the retiring partner refused to make such offer.

How notice may be given. — In *Glassington v. Thwaites* (*a*), the articles provided that no share should be disposed of by any partner until one month after notice in writing under his hand had been given to the other proprietors at a monthly meeting. A partner desirous of selling his share, wrote a notice to that effect in a book which was produced at monthly meetings, and which all the partners had at all times power to inspect. It was held that the notice so given was sufficient, even although the book was not seen by all

(*u*) As to the interest in the goodwill where nothing is said about it, see *infra*.

(*x*) *Jefferys v. Smith*, 3 Russ. 158, ante, p. 365.

(*y*) *Cassels v. Stewart*, 6 App. Ca. 64. The clauses were not so worded as to prevent such a sale.

(*z*) 1 Eq. 567.

(*a*) *Coop. temp. Brougham*, 115.

the partners. As a general rule, however, notice should be given to each partner individually (*b*).

Sale if offer is declined.—Where two persons became partners, and agreed that in the case of the death of either, the other should buy his share, or if he declined so to do, then that the share of the deceased should be sold to any person who might choose to buy it, one of the partners died, and the survivor declined to buy his share, or to enter into partnership with any purchaser of it. Under these circumstances, the Court, at the suit of the *executor of the deceased partner, decreed a sale of his share, and directed that, if no *bonâ fide* sale could be effected, an account should be taken in order to ascertain the value of such share. No sale being effected, and the accounts having been taken, the surviving partner was decreed to pay the amount of the share of the deceased and the costs of the suit (*c*).

Declaring option to purchase.—Articles of partnership frequently contain a clause to the effect, that in case a partner is desirous of retiring, he shall give so many months' notice to his co-partner, who shall have the option of purchasing the share of the retiring partner. If such a clause is acted on, and a partner notifies his desire to retire to his co-partner, and the latter declares his option to purchase the share of the retiring partner, a contract is thereby concluded between them, from which neither can depart without the consent of the other (*d*). Consequently, the retiring partner cannot withdraw his notice and dissolve the partnership under some other clause in the deed (*d*). Even if the co-partner who is to purchase the other's share infringes the partnership articles, the Court will not willingly interfere and dissolve the partnership; although, if the partner who is to retire conducts himself so as to prejudice the business and exclude the other, the Court will interpose for the protection of the latter; for otherwise the business to which he is shortly to be solely entitled may be entirely ruined (*e*).

Enlarging time for purchasing.—With respect to the exercise of a right of pre-emption, it must be borne in mind that if

(*b*) *Ib.*

(*c*) Featherstonhaugh v. Turner,

25 Beav. 382.

(*d*) See Warder v. Stilwell, 3 Jur.

N. S. 9, V.-C. Stuart; Homfray v.

Fothergill, *ante*, p. 423.

(*e*) See Warder v. Stilwell, 3 Jur.

N. S. 9.

the right is to be exercised within a given time it cannot be exercised afterwards, unless the time has been enlarged by the parties themselves. Courts will not extend the time on the ground that it was accidentally allowed to slip by (*f*).

Where an offer to sell was made to a person who became lunatic after it was made, but before the time for accepting it had expired, it was held that his committee was not

*entitled to an extension of such time, nor to a renewal of the offer (*g*). [*425]

12. **Dissolving the firm.**—Where the articles expressly stipulate that it shall be lawful for either partner to dissolve the partnership upon the commission by the other of certain specifically forbidden acts, the partnership may of course be determined if either partner does these acts. But this clause, like any other, may be waived by mutual consent; and even if not waived, advantage cannot be taken of it to dissolve the partnership on the ground of the commission of any forbidden act, after the lapse of any considerable time since such act came to the knowledge of the partner seeking to avail himself of it (*h*).

In case of insolvency.—It is not unusual to provide for a dissolution or retirement in case a partner shall become insolvent. The word *insolvent*, unless controlled by the context, means unable to pay debts, in the ordinary acceptation of that phrase. A person may therefore be insolvent, although his assets, if all turned into money, might enable him to pay his debts in full (*i*), and although he has not been adjudicated bankrupt or compounded with his creditors (*k*). But a person is not deemed insolvent merely because he keeps renewing a bill which he cannot conveniently meet (*l*).

Giving notice where one partner is insane.—A clause enabling

(*f*) See on this subject, *Brooke v. Garrod*, 2 De G. & J. 62; *Lord Ranelagh v. Melton*, 2 Dr. & Sm. 278.

(*g*) *Rowlands v. Evans*, and *Williams v. Rowlands*, 30 Beav. 302.

(*h*) See *Anderson v. Anderson*, 25 Beav. 190, which must not be considered as an authority for the doctrine that the Court will not hold partners to their articles. The notice to dissolve in that case was given six months after the commission of the act complained of, and not on account

of such act, but in consequence of other disputes.

(*i*) See *per Le Blanc, J.*, in *Bayly v. Schofield*, 1 M. & S. 338.

(*k*) See *Parker v. Gossage*, 2 C. M. & R. 617, and *Biddlecombe v. Bond*, 4 A. & E. 332, in which it was held that "insolvent" had not the technical meaning of having taken the benefit of the acts for the relief of insolvent debtors.

(*l*) *Cutten v. Sanger*, 2 Y. & J. 459; and see *Anon.*, 1 Camp. 492.

any partner to determine the partnership by giving notice to the others, may be acted on, although one of the firm has become insane; for the partner serving the notice is not bound to find understanding for him who is served (*m*).

[*426] * **Withdrawal of notice.** — A notice once given cannot be withdrawn except by consent (*n*).

Informal notice. — A notice to dissolve on a given day of the week, and a given day of the month, is bad if there is any mistake in either date; *e.g.*, a notice to dissolve on Monday the 9th is bad, if the 9th falls on a Friday (*o*).

Dissolution to be by deed. — In a case where it was provided that the dissolution should be by deed, it was held that a submission by deed of all matters in dispute between the partners, and an award under seal made upon that submission dissolving the partnership, had the effect of dissolving it, although nothing was said about dissolution in the submission (*p*).

Signing notices of dissolution. — When power is given to retire or dissolve the firm, or to expel a partner from it, power should also be given to any partner to sign, in the name of himself and co-partners, a notice of dissolution for insertion in the "Gazette" (*q*).

Powers of expulsion. — In order that an objectionable partner may be summarily got rid of, clauses are sometimes inserted providing for expulsion in certain events. The Court cannot control the exercise of a power to expel if it is exercised *bonâ fide* (*r*). But all clauses conferring such a power are construed strictly, on account of the abuse which may be made of them, and of the hardship of expulsion; and the Court will never allow a partner to be expelled if he can show that his co-partners, though justified by the wording of the expulsion clause, have, in fact, taken advantage of it for base and unworthy purposes of their own, and contrary to that truth and honour which every partner has a right to de-

(*m*) Robertson *v.* Lockie, 15 Sim. 285.

(*n*) Jones *v.* Lloyd, 18 Eq. 265.

(*o*) Watson *v.* Eales, 23 Beav. 294.

(*p*) Hutchinson *v.* Whitfield, Hayes (Ir. Ex.), 78.

(*q*) See Troughton *v.* Hunter, 18 Beav. 470. The Court will, however, compel a partner to do this on a dissolution, Hendry *v.* Turner, 32 Ch. D. 355.

(*r*) Russell *v.* Russell, 14 Ch. D. 471; Steuart *v.* Gladstone, 10 ib. 626.

mand on the part of his co-partners. In *Blisset v. Daniel* (s), the expulsion clause was as follows:—

“That it shall be lawful for the holders of two-thirds or more of the shares for the time being, from time to time to expel any partner, by giving *to, or leaving for him, at his then or last place [427] of abode in England or Wales, a notice in writing under their hands of such expulsion, which, in such event, shall operate from and at the time of the giving or leaving such notice, and shall be in the following form, namely, ‘We do hereby give you notice that you are hereby expelled from the partnership carried on under the firm of *John Freeman and Copper Company*. Witness our hands this — day of —.’”

The power, therefore, was in the most general terms; no reasons for its exercise were required to be given, no meetings or deliberations were declared to be necessary, before serving the notice. The holders of two-thirds of the shares signed a notice in the form prescribed, and served it on the partner whom they desired to expel. They gave no reasons, and relied upon the clause set out above. But it appeared that they desired to get rid of their co-partner, not because so to do was in any sense for the benefit of the firm in a mercantile point of view, but because he objected to the appointment of one of his co-partner's sons as co-manager with his father. It further appeared that the offended father had complained to the other partners behind the back of the expelled partner, and had prevailed upon them to sign the notice, intimating that either the expelled partner or himself must leave the firm. The expelling partners having resolved to exercise the power, induced the expelled partner to sign certain accounts, in order that he might be bound by them when expelled. Their intention to expel him was, however, concealed until after the accounts were signed; and the notice of expulsion, which gave him the first intimation of any design to get rid of him, was not served until he had signed the accounts. Under these circumstances, the Court declared that the notice of expulsion was void, and restored the expelled partner to his rights as a member of the firm.

Opportunity for explanation.—Having regard to the principles acted upon in cases of this description, it is conceived that a power to expel for misconduct cannot be safely acted

(s) *Blisset v. Daniel*, 10 Ha. 493. See, also, *Wood v. Woad*, L. R. 9 Ex. 190.

upon until the delinquent partner has had an opportunity of explaining his conduct (*t*).

All must concur. — A power of expulsion cannot be [*428] exercised without the *concurrence of *all* those whose concurrence may be required by the articles (*u*).

Notice of expulsion. — A notice of expulsion under one clause, cannot, if invalid, operate as a notice of dissolution under some other clause (*x*).

In *Smith v. Mules* it was provided, in effect, that if a partner should do or omit to do certain things, the others should be at liberty to dissolve the partnership, by giving notice to the partner who should offend; and that upon giving such notice the partnership should cease and be dissolved in the same manner, and with the same consequences, as if it had been determined by the voluntary retirement of the offending partner. The firm consisted of three partners, A., B., and C., who was B.'s son. B. was guilty of conduct for which he might have been compelled to retire. A. gave B. and C. notice that he dissolved the partnership under the clause above referred to. C., however, had done nothing rendering it competent for A. to expel him. It was therefore decided: 1, that A. had no right to expel B. without C.'s concurrence; 2, that A. had no right to dissolve the firm, so far as C. was concerned; 3, that C. having adopted the notice after it was given, A. could not treat the partnership as continuing; and 4, that the dissolution actually brought about was not a dissolution provided for by the articles, and did not, therefore, entail the consequences of a dissolution under them (*y*).

Power to expel in case of omitting to do things. — When a power of expulsion is given in the event of a partner omitting to do certain things, *e.g.*, entering in the partnership book all monies he may receive on account of the partnership, the power will not, as a rule, be exercisable, unless the omission was a studied omission (*z*).

As to power to expel, in case a partner becomes insolvent, see *ante*, p. 425.

(*t*) See the judgment in *Blisset v. Daniel, and Cooper v. Wandsworth Board of Works*, 14 C. B. N. S. 180.

(*u*) See *Stenart v. Gladstone*, 10 Ch. D. 626; *Smith v. Mules*, 9 Ha. 556.

(*x*) See *Smith v. Mules*, 9 Ha. 556; *Hart v. Clarke*, 6 De G. M. & G. 232, and *Clarke v. Hart*, 6 H. L. C. 633.

(*y*) *Smith v. Mules*, 9 Ha. 556.

(*z*) See *Smith v. Mules*, 9 Ha. 556.

A power to expel contained in articles for a partnership for a term of years is not exercisable after the term has expired, *although the partnership may have [*429] been continued on the old footing (*a*).

14. **Valuation of shares.** — Having provided for the events upon which a partnership is to cease, the next point is to specify the method in which its affairs are to be wholly or partially wound up.

General rule where the articles cannot be acted on. — Where the articles have prescribed no method of winding up, or where the method prescribed cannot be carried into effect, then, unless the partners can come to some agreement as to what is to be done, there must, as a general rule, be a conversion of all the partnership property into money; and this money, after payment of the partnership debts, must be divided amongst the partners in the shares in which they may be entitled to it (*b*).

Agreements for fair division. — An agreement that on a dissolution the partnership property shall be fairly and equally divided, after payment of its debts, has been held to mean that the property shall be sold, and that the money produced by the sale shall be divided after the debts have been paid (*c*).

Methods of avoiding sale. — In order to prevent the ruin consequent on a sale when a partnership happens to be dissolved, several devices are had recourse to. The simplest is to specify in the articles a sum at which the share of an outgoing or deceased partner may be taken by his co-partners (*d*). But it is seldom possible to fix a sum beforehand, and consequently such a provision is not common. It is more usual to stipulate that the share shall be taken to be of the value appearing in the last-signed account, and be paid with the addition of subsequent profits, or with interest at a certain rate, in lieu of such profits. If a stipulation to this

(*a*) *Clark v. Leach*, 32 Beav. 14, and 1 De G. J. & Sm. 409. See *Neilson v. Mossend Iron Co.*, 11 App. Ca. 298.

(*b*) See *Cook v. Collingridge*, Jac. 607; *Kershaw v. Matthews*, 2 Russ. 62; *Wilson v. Greenwood*, 1 Swanst. 482. That this rule is not to be rigorously applied, see *Pettyt v.*

Janeson, 6 Madd. 146, and *Simmons v. Leonard*, 3 Ha. 581, noticed *infra*, p. 431.

(*c*) *Rigden v. Pierce*, 6 Madd. 353; *Cook v. Collingridge*, Jac. 607.

(*d*) Effect was given to such a provision in *Essex v. Essex*, 20 Beav. 442.

effect is made, and the accounts have been regularly taken and signed, or regularly taken but not signed (*e*), [*430] *so that the shares of the partners appear from the accounts as intended, all parties must abide by the stipulation (*f*), although difficulties may arise as to the true construction of the articles (*g*).

Effect of not keeping accounts as agreed.— But if, as frequently happens, the accounts intended to be taken and signed have not been taken, or have been taken irregularly, so that the last-signed account is not so late a one as is contemplated by the articles, in such a case the account must be made up to the latest date at which it ought to have been made up, regard being had to the articles and the practice of the partners; and the share of the outgoing or deceased partner must be taken at its value, as the same appears by the account so taken.

Thus in *Pettyt v. Jameson* (*h*), the articles provided that the partnership accounts should be taken every 25th of March, and that if either partner died during the continuance of the partnership, his interest should be regulated by the last yearly settlement, and what should then appear to be due to him should be paid to his executors, with five per cent. interest, instead of subsequent profits. For some time the partnership accounts were regularly settled every 25th of March; but afterwards they were made up very irregularly, and often not for sixteen or eighteen months. A partner died in February, 1813. The last account prior to his death was settled on the 5th of November, 1811. The executors insisted that as there had been no annual settlement, as contemplated by the articles, they were entitled to a share of the profits calculated to the time of their testator's death. The surviving partner, on the other hand, contended that all

(*e*) As in *Ex parte Barber*, 5 Ch. 687; *Coventry v. Barclay*, 3 De G. J. & Sm. 320.

(*f*) *King v. Chuck*, 17 Beav. 325; *Gainsborough v. Stork*, Barn. 312; and the cases in the last note.

(*g*) A provision that a share shall be paid for as the same stood at the time of the last account, means as it stood in the partnership books. See *Blisset v. Daniel*, 10 Ha. 493, p. 511. See, as to clauses of this description,

Coventry v. Barclay, *ante*, p. 421; *Ex parte Barber*, *ubi supra*; and *Browning v. Browning*, 31 Beav. 316, as to interest and subsequent drawings out. As to the calculation of interest where the share is to be paid out, with interest, by instalments, see *Ewing v. Ewing*, 8 App. Ca. 822. As to goodwill, *Stewart v. Gladstone*, 10 Ch. D. 626, and *infra*.

(*h*) 6 Madd. 146.

they were entitled to was the amount of their testator's share, as appearing by the account settled in November, 1811, with interest thereon. But the Vice-Chancellor observed:

* "That the articles had two plain intentions—that there [*431] should be an annual settlement, and that the estate of a deceased partner should receive no profits for the fraction of the year since the last annual settlement. That the settlement of the 5th November, 1811, was to be considered as a settlement substituted by the agreement of the parties in the place of the settlement stipulated for in the articles. That if the testator had died on the 1st October, 1812, it could not have been contended that his estate was to take profits subsequent to the 5th November, 1811, being the last settlement within a year of the death; and if this were to be treated in that case as a settlement, within the spirit of the articles, against the testator's estate, it must be equally considered as a settlement for the testator's estate as a settlement on the 5th November, 1811, which bound each party to come to the next annual settlement on the 5th November, 1812. That the Court must act upon that which ought to have been done as if it had been done, and must declare the testator's estate entitled to a share in the profits up to the 5th November, 1812, being the day which ought to have been the last annual settlement before the testator's death."

The same principle was acted upon by V.-C. Wigram, in *Simmons v. Leonard* (i), although no account having ever been taken between the parties, and the day mentioned in the articles for taking the account not being apparently considered of much importance, the account directed to be taken did not stop at the day at which the last account would have been taken if the articles had been acted on. In *Simmons v. Leonard*, the articles provided that a general account and rest should be taken every 31st of December, or on such other day as the partners should agree upon; and that if a partner died during the term his executors should receive payment of his share as ascertained at the last annual rest, with interest thereon, in lieu of subsequent profits; and that his executors should have no right to look into the partnership books. The provision relative to the annual settlement of an account was never acted upon at all. One of the partners died, and the Vice-Chancellor held that the primary object of all parties was, that the death of one of them should not cause a general dissolution and winding up; that this object might be attained, although no such account as was

contemplated had been taken; that it was absolutely necessary to take an account of some sort, and to let the executors, therefore, look into the partnership books; and that, [*432] having regard to the omission of *the partners to settle any account at all, the only account which could be taken was a general account of what was due to the testator at the time of his death for his share of capital and profits.

In *Lawes v. Lawes* (*k*) the articles provided for taking half-yearly accounts, and that on the death of a partner his share should be taken at the amount settled by the last half-yearly account. The accounts were in fact settled once a year only; but on the death of a partner it was held that his share was not to be taken at the amount shown by the last annual account actually taken, but at the amount shown by an account to be taken at the end of the half-year next before his death as stipulated by the articles.

These cases not only afford good illustrations of the rule that in construing partnership articles regard must be had to the conduct of the partners, even where a circumstance has arisen of which the partners had no previous experience (*l*), but they also show that this rule will not be applied unfairly, and further that the rule that there must be a sale of the partnership property whenever there is a dissolution, unless the articles provide for some other method of dealing with it, and the provisions in the articles are capable of being rigorously carried out, must be taken with considerable qualification (*m*).

Taking share at a valuation. — It is not unusual to stipulate that the share of an outgoing or deceased partner shall be taken by the continuing or surviving partners at a valuation; and although as a rule specific performance of an agreement for sale at a valuation will not be decreed unless the valuation has been made (*n*); yet where persons enter into partnership upon certain terms, one of which is, that on a dissolution one partner shall take the share of another at a valuation

(*k*) 9 Ch. D. 98.

(*l*) See, too, *Jackson v. Sedgwick*, 1 Swanst. 460; *Coventry v. Barclay*, and *Ex parte Barber*, ante, note (*e*).

(*m*) See, as to the rule referred to, ante, p. 429.

(*n*) See *Vickers v. Vickers*, 4 Eq. 529, a case between partners and the authorities there cited. The rule does not apply to a valuation of things which are accessories to the main purchase. See *Jackson v. Jackson*, 1 Sm. & G. 184.

tion, the Court will, on a dissolution under the articles, enforce such a stipulation, and if necessary *it- [*433] self ascertain the value of the share (*o*). It has, however, been held, that an agreement for a sale at a price to be fixed by valuers, one to be appointed by the seller and the other by the purchaser, or in case the valuers differ, by an umpire, does not enable the Court to appoint an umpire if the valuers will not do so, and are yet themselves unable to fix a price (*p*). Moreover, *Wilson v. Greenwood* (*q*), throws considerable doubt on the validity, in the event of a bankruptcy, of an agreement that the share of a bankrupt partner shall be taken at a valuation by his co-partners.

15. Transmission of shares and introduction of new partners.

— It is a common provision in partnership articles that on the death of a partner his executors, or his son, or some other person, shall be entitled to take his place. The effect of any such provision must of course depend on its words; but speaking generally it may be said, —

1. That clauses of this kind, although they bind the surviving partners to let in the person nominated (*r*), do not bind him to come in, but give him an option whether he will do so or not (*s*);

2. That before making up his mind he is entitled to make himself acquainted with the state of the partnership affairs, although he is not entitled to have its accounts formally taken (*t*);

3. That if he is desirous of coming in, he must comply strictly with the terms upon which alone he is entitled to do so (*u*);

(*o*) *Dinham v. Bradford*, 5 Ch. 519. See, as to contracts to sell at a fair valuation, as distinguished from a valuation to be made by particular individuals, *Fry on Spec. Perf.* 154, 2d ed.

(*p*) *Collins v. Collins*, 26 Beav. 306; and see *Vickers v. Vickers*, 4 Eq. 529.

(*q*) 1 Swanst. 471. See, also, *Whitmore v. Mason*, 2 J. & H. 204.

(*r*) In *Wainwright v. Waterman*, 1 Ves. J. 311, a person was declared entitled to be admitted, although those with whom that question rested were divided in opinion. But in *Mill-*

liken v. Milliken, 8 Ir. Eq. 16, it was held that a person who is to be let in, provided he conducts himself to the satisfaction of the survivors, is without remedy if they will not admit him.

(*s*) *Pigott v. Bagley*, McCl. & Y. 569; *Madgwick v. Wimble*, 6 Beav. 495; *Downs v. Collins*, 6 Ha. 418; *Page v. Cox*, 10 Ha. 163. See, too, *Pearce v. Chamberlain*, 2 Ves. S. 33.

(*t*) *Pigott v. Bagley*, McCl. & Y. 569.

(*u*) *Holland v. King*, 6 C. B. 727; *Brooke v. Garrod*, 3 K. & J. 608, and 2 De G. & J. 62; *Milliken v. Milli-*

[*434] *4. That if he declines to come in, and there is no provision as to what is then to be done, the partnership must be dissolved and wound up in the usual way (*v*).

Persons entitled to succeed will be assisted in equity. — As a general rule, and excluding cases of agency, an agreement between two persons cannot be enforced against either of them by a third person, even although such third person was intended to derive a benefit from the agreement (*x*). In *Page v. Cox* it was attempted to apply this rule to an agreement between two partners, that on the death of one his widow should succeed him. One of the partners was dead: it was contended that his widow had no right to succeed. But it was held that the rule in question had no application to such a case; that the articles had created a valid trust in favour of the widow; and that she was entitled to come to the Court for a decree for the execution of such trust (*y*).

Cases of settled share. — In a case where articles provided that in the event of the death of a partner during the term for which the partnership was intended to last, his share should go to his widow for life, and after her death to his children, and in default of children to his widow's executors, administrators, or assigns; it was held that the children of a partner who had died leaving a widow, did not take any vested interest in the partnership assets during her life (*z*).

Appointment of successor. — In another case partnership articles provided that on the death of a partner the survivor should carry on the business for the benefit of himself and such person as the other should by will appoint, and in default of appointment, for the benefit of his widow, or (if she should be dead) for the benefit of his children, and in default of children for the benefit of his executors or administrators; and that such person, or the said widow, children, executors, or administrators, should stand in the place of the deceased, and be entitled to the same share in, and have the same control over, the partnership trade and assets, as the deceased would himself have been entitled to

ken, *supra*, note (*r*). See *Ex parte Marks*, 1 D. & Ch. 499.

(*v*) *Kershaw v. Matthews*, 2 Russ.

62; *Downs v. Collins*, 6 Ha. 418;

Madgwick v. Wimple, 6 Beav. 495.

(*x*) See *Colyear v. The Countess*

of Mulgrave, 2 Keen, 81; *Re Empress Engineering Co.*, 16 Ch. D. 125.

(*y*) *Page v. Cox*, 10 Ha. 163. See, also, *Murray v. Flavell*, 25 Ch. D. 89; *Dale v. Hamilton*, 2 Ph. 266.

(*z*) *Balmain v. Shore*, 9 Ves. 500.

if *living. It was held that this was not, technically speaking, a power of appointment, and that consequently a partner could bequeath his share by a will which did not allude either to the power or to the partnership (*a*).

Position of incoming partner.—When a person has been admitted into an existing firm, and no express agreement has been made as to his rights and liabilities, the inference is that as between themselves his position is the same as that of the other partners. If they are bound by existing articles he will be bound by the same articles, if his conduct justifies the conclusion that he has assented to them; and if any special agreement is made with him, it will be regarded as incorporated with any previous agreement between the older partners, although so far as the two agreements may be inconsistent, the latest will prevail (*b*). If, indeed, the incoming partner has no knowledge of any prior agreement between the others, he cannot be bound thereby (*c*); for nothing that he can have done can be regarded, under these circumstances, as evidence of any assent thereto on his part; and it is upon such presumed assent that the rule in question is founded.

16. Annuities to widows.—Sometimes it is agreed that if a partner dies the survivor shall pay an annuity, or a share of the profits, to his widow. There is now no difficulty in framing a clause of this sort without making the widow a partner or a quasi-partner by virtue of her participation in profits (*d*); and after her husband's death she can enforce payment of the provision intended for her (*e*).

Annuity payable out of profits and none made.—If the annuity is made payable out of the profits, and the business is carried on and no profits are made, no annuity will be payable. So, if the surviving partner has an option to pay either an annuity or a share of the profits, and there should be no profits, he will not be bound to pay anything; for *ex hypothesi*, it is competent for him to elect to pay out

(*a*) *Ponton v. Dunn*, 1 R. & M. 402. See, also, *Beamish v. Beamish*, Ir. Rep. 4 Eq. 120, where a bequest of a share of residue was held not to amount to a nomination of a successor.

(*b*) See *Austen v. Boys*, 24 Beav. 598, and 2 De G. & J. 626.

(*c*) *Ibid*.

(*d*) See, as to this, *ante*, p. 35.

(*e*) See *Murray v. Flavell*, 25 Ch. D. 89; *Page v. Cox*, 10 Ha. 163, *ante*, p. 434.

[*436] of the *profits, and his right to make this election in no way depends on their amount (*f*). Moreover, in construing a provision giving a widow of a deceased partner a share of the profits, the partnership which, strictly speaking, determined when her husband died, is regarded as continuing, and the profits which she is to share must be ascertained on that principle. They ought not to be calculated as if the returns yielded by the new business had not to be applied in liquidating the demands on the old firm (*g*).

Annuity payable until eviction.—In *Holyland v. De Mendez* (*h*) a continuing partner gave a bond conditioned to be void on payment of annuity, or on being without his own default dispossessed of the partnership property assigned to him. It was held that the annuity did not cease on the bankruptcy of the continuing partner; dispossession by his assignees not being such a dispossession as was contemplated in the bond.

Effect of discontinuing business.—An agreement to pay an annuity out of profits involves an obligation not wilfully to prevent the earning of profits; and if, therefore, the person who has to pay the annuity wilfully ceases to carry on business he becomes liable to an action for damages (*i*). In order, however, to provide as far as possible against any attempt to defeat the annuity by discontinuing the business, it is desirable that the partner continuing the business should covenant not only that he will carry on the business and pay the annuity, but that he will not transfer the business, or take in any fresh partner, without procuring from the transferee or new partner a similar covenant on his part (*k*).

17. **Prohibitions against carrying on business.**—A subject upon which it is always desirable to make some express agreement is the extent to which a retiring partner shall be restrained from commencing business on his own account, and in opposition to the continuing partner.

(*f*) *Ex parte Harper*, 1 De G. & J. 180.

(*g*) *Ibid.*

(*h*) 3 Mer. 184.

(*i*) *McIntyre v. Belcher*, 14 C. B. N. S. 654. *Telegraph Dispatch Co.*

v. McLean, 8 Ch. 658. Compare *Rhodes v. Forwood*, 1 App. Ca. 256.

(*k*) A purchaser of the business with notice of such a covenant would take subject to it, see *Werderman v. Société Générale d'Electricité*, 19 Ch. D. 246.

Rule where there is no prohibition.—In the absence of any *agreement upon the subject, a retiring partner is as much at liberty to set up for himself, in opposition to the firm he has quitted, as he would be if he had never belonged to it; and on a general dissolution of partnership, all the partners are at liberty to commence business in opposition to each other, as freely as if they had never been partners, unless they have entered into some agreement not to do so. A dissolution *per se* obliges no partner to retire from business, or to refrain from seeking a livelihood in the manner in which he has been accustomed so to do, and in the neighbourhood where he is known (*l*).

After sale of good-will.—As will be seen presently, even a sale by an outgoing partner of all his interest in the partnership business, including the good-will thereof, does not preclude him from setting up a new business in opposition to the continuing partners; but it does preclude him from so doing in the name of the old firm and from representing himself as continuing the business sold (*m*). But an agreement by an outgoing partner not to carry on business in rivalry with his late co-partners may be implied even where not distinctly expressed (*n*).

Agreement not to carry on business enforced.—An agreement by a retiring partner not to commence business in opposition to his late partners, will be enforced, if the restriction imposed upon him is not unlimited, both as regards time and distance, and is not unreasonable, having regard to the nature of the partnership business (*o*). Thus, in *Williams v. Williams* (*p*), the defendant, who had been in partnership * with the plaintiffs, in running coaches between [*438] Reading and London, sold his share in the business

(*l*) See *Dawson v. Beeson*, 22 Ch. D. 504; *Farr v. Pearce*, 3 Madd. 78; *Davies v. Hodgson*, 25 Beav. 177; and the next head, No. 18, Good-will.

(*m*) *Churton v. Douglas*, Johns. 174, noticed *infra*, p. 441.

(*n*) See *infra*, p. 442.

(*o*) See, generally, as to covenants not to carry on business, *Mitchell v. Reynolds*, 1 Smith's L. C.; also the useful table appended to *Avery v. Langford*, Kay, 663. As to whether such covenants can be reasonable, if unlimited both as to time and space,

see *Davies v. Davies*, 36 Ch. D. 359, where the covenant was unlimited "so far as the law allows," and was held to be too uncertain to be enforced, and also to be personal to the covenantees. In *Palmer v. Mallet*, 36 Ch. D. 411, the covenant was joint in form, but was held to be joint and several as regards the covenantees. Distances are measured as the crow flies, *Duigan v. Walker*, Johns. 446; *Mouflet v. Cole*, L. R. 7 Ex. 70, and 8 Ex. 32.

(*p*) 2 Swanst. 253.

to them, and covenanted not to run any coach between Reading and London, or so as to injure the business of the plaintiffs; and this covenant was enforced in equity. So, in *Tallis v. Tallis* (*q*), the Court of Queen's Bench upheld a covenant entered into by a retiring member of a firm of booksellers not to carry on the canvassing trade in London, nor within 150 miles of the General Post-Office, nor in, nor within fifty miles of Dublin or Edinburgh, nor in any town in Great Britain or Ireland in which the continuing partner or his successors might at the time have an establishment.

Consideration.—An agreement entered into when a partnership is formed, to the effect that a retiring partner shall not carry on the business carried on by the firm, cannot be invalid for want of consideration (*r*).

An agreement with a bankrupt to take his son into partnership, and to employ the bankrupt, is a sufficient consideration for an agreement by him not to carry on business in competition with the firm (*s*).

Solicitors' papers, &c.—In framing articles of partnership between solicitors, provision should always be made respecting the deeds and documents in their possession, but belonging to their clients.

It need hardly be observed that no agreement which the solicitors may make between themselves, will prejudice their clients. Subject to any question of lien, the clients are entitled to have their deeds and documents, and all drafts and copies thereof, paid for by them, delivered up on request (*t*). They have, moreover, a right to the joint assistance of all the members of the firm employed by them; and although, if the firm is dissolved, a client cannot insist that the partners shall continue to act as his solicitors, it is clear that they cannot, without his consent, turn him over to one of them-
[*439] selves (*u*); * nor act against him as if he had never been a client (*x*). The dissolution operates as a discharge of the client by the solicitors; and the client is thereupon entitled, subject to any question of lien, to have his deeds and papers delivered up to him (*y*).

(*q*) 1 E. & B. 391. See, too, *Atkins v. Kinnier*, 4 Ex. 776; *Reynolds v. Bridge*, 6 E. & B. 528.

(*r*) *Per* Lord Cranworth, in *Austin v. Boys*, 2 De G. & J. 626.

(*s*) *Clarkson v. Edge*, 33 Beav. 227.

(*t*) *Ex parte Horsfall*, 7 B. & C. 528.

(*u*) *Cook v. Rhodes*, 19 Ves. 272, note.

(*x*) *Cholmondeley v. Clinton*, 19 Ves. 261.

(*y*) *Griffiths v. Griffiths*, 5 Ha. 587;

But as between the solicitors themselves, it is competent for them to agree that, if they dissolve partnership, the clients of the old firm, and all their deeds and papers, shall be divided amongst the partners, or belong solely to the partner who continues to carry on the business of the firm; and such an agreement will be enforced (*z*). If no such agreement is come to, each partner may, after a dissolution, do his best to induce the old clients to continue him as their sole solicitor.

18. **Good-will.** — In connection with the subject considered under the last head, it is necessary to allude to the good-will of a trade or business.

Nature of good-will. — The term good-will can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good-will has a marketable value, whether the business is that of a professional man or of any other person (*a*). But it is plain that good-will has no meaning except in connection with a continuing business (*b*); it may have no value except in connection with a particular house, and may be so inseparably connected with it as to pass with it under a will or deed without being specially mentioned (*c*). In such a case the good-will *in- [*440] creases the value of the house; but the value of the good-will of any business to a purchaser depends, in some cases entirely, and in all very much, on the absence of competition on the part of those by whom the business has been previously carried on.

Now it has just been seen that there is no obligation on the part of any of the partners to retire from business merely because the partnership between them is dissolved.

Carrying on business after selling it. — Further, it is held, although it is certainly an extraordinary doctrine, that if a

Colegrave *v.* Manley, T. & R. 400; and see Vaughan *v.* Vanderstegen, 2 Drew. 409; and *ante*, p. 120.

(*z*) Whittaker *v.* Howe, 3 Beav. 383. See, however, Davidson *v.* Napier, 1 Sim. 297.

(*a*) Good-will is property within the meaning of the stamp acts, Potter *v.* The Commissioner of the Inland Revenue, 10 Ex. 147.

(*b*) See, as to a legacy of good-will, apart from any share in a business, Robertson *v.* Quiddington, 28 Beav. 529.

(*c*) As in Blake *v.* Shaw, Johns. 732; Chisum *v.* Dewes, 5 Russ. 29; *Ex parte* Punnett, 16 Ch. D. 226; Pile *v.* Pile, 3 Ch. D. 36; and see *per* Cotton, L. J., in Cooper *v.* Met. Board of Works, 25 Ch. D. 479.

person sells the good-will of his trade or business, that does not disentitle him from recommencing a similar trade or business in the immediate vicinity of the place where the old one was carried on (*d*): and, therefore, if it is simply agreed that a partnership shall be dissolved, and that one partner shall buy the other out, and this agreement is carried into effect, the retiring partner will nevertheless be at liberty to recommence business in the old line in the old neighborhood (*e*); and he may not only advertise the fact (*f*), but he may also solicit business from, and carry on business with, the old customers and correspondents of the firm (*g*). But he must not hold himself out as continuing *the* business which he has sold, and must not therefore carry it on in the name in which it was carried on before he sold it (*h*). At the same time, if that name happens to be his own, it is by no [*441] * means clear that he could be restrained from carrying on business in that name (*i*).

The last propositions are well illustrated by the important case of *Churton v. Douglas* (*k*). There two of the plaintiffs, and the defendant, whose name was *John Douglas*, carried on business in partnership under the firm of *John Douglas & Co.*, as stuff merchants at Bradford. The defendant retired from the firm; a new partner was taken in; and the defendant assigned to his old partners and their new partner (being the plaintiffs) all his, the defendant's, share and interest in the old firm, and in the good-will thereof. The plaintiffs continued to carry on the old business under a new name, with the addition

(*d*) *Cruttwell v. Lye*, 17 Ves. 335; *Harrison v. Gardner*, 2 Madd. 198; *Kennedy v. Lee*, 3 Mer. 455; *Shackle v. Baker*, 14 Ves. 468. See, too, *Davies v. Hodgson*, 25 Beav. 177, and *Churton v. Douglas*, Johns. 174. In *Johnson v. Helleley*, 34 Beav. 63, notice of this right was directed by the Court to be given in the particulars of the sale of the good-will.

(*e*) See *Kennedy v. Lee*, 3 Mer. 452; *Mellersh v. Keen*, 27 Beav. 236; *Bradbury v. Dickens*, ib. 53; *Smith v. Everett*, ib. 446, and the next note.

(*f*) *Hookham v. Pottage*, 8 Ch. 91; *Labouchere v. Dawson*, 13 Eq. 322, and see *Cruttwell v. Lye*, 17 Ves. 335.

(*g*) *Pearson v. Pearson*, 27 Ch. D. 145; *Vernon v. Hallam*, 34 ib. 748, overruling, as to this, *Labouchere v. Dawson*, 13 Eq. 322; *Ginesi v. Cooper & Co.*, 14 Ch. D. 596; and *Leggott v. Barrett*, 15 Ch. D. 306. N.B. — The order against soliciting the old customers was not appealed against in this last case. See, also, *Walker v. Mottram*, 19 Ch. D. 355; *Dawson v. Beeson*, 22 ib. 504.

(*h*) *Churton v. Douglas*, Johns. 174; *Hookham v. Pottage*, 8 Ch. 91, where the defendant described himself as P. from H. & P., the old firm, but in a way calculated to deceive.

(*i*) See ib. and *ante*, book i. ch. 6, § 2.

(*k*) Johns. 174.

late *John Douglas & Co.* The defendant formed a new partnership with three persons who had been in the employ of the old firm, and whom he had enticed to leave the service of its successors and to join him; and he and his new partners commenced business as stuff merchants at Bradford, in a house adjoining the place of business of the old firm; and they did so in the name of *John Douglas & Co.* They further affixed that name to the house they had taken, and sent circulars to the old customers of the old firm, so as to lead them to suppose that the business of that firm was being continued by the defendant and his new partners. On a bill filed by the plaintiffs against the defendant it was held, (1), that he was entitled to carry on, by himself or in partnership with others, the kind of business previously carried on by him with his late partners; and, (2), that he was entitled so to do in the immediate neighbourhood of the place where he and his late partners previously carried on their business. But it was also held, (3), that the plaintiffs alone had the right to carry on the business previously carried on by *John Douglas & Co.*; (4), that the plaintiffs had the right to represent themselves as the successors of that firm; (5), that the defendant had no right to represent himself as its successor; (6), that he could not acquire such a right by taking other persons into partnership with him; and, (7), that although his name was John Douglas, he had not, either alone or in partnership with others, the *right to carry on the old kind of business, in the [*442] old place, under the old name of *John Douglas & Co.*

An injunction was granted accordingly to restrain the defendant from carrying on the business of a stuff merchant, at or in the immediate neighbourhood of Bradford, either alone or in partnership, under the style *John Douglas & Co.*, or in any other manner holding out that he was carrying on the business of a stuff merchant in continuation of, or in succession to, the business carried on by the late firm of *John Douglas & Co.*

Implied agreement not to continue in business.—An agreement by a partner that he will not carry on business in opposition to his late co-partners may however be implied from some other agreement into which he and they have entered. Thus where two persons became partners as brewers for eleven years, and it was provided in the articles that either of the parties, on giving six months' notice to the other,

should be at liberty to *quit the trade and mystery of a brewer*, and that the other should be at liberty to continue the trade on his own account: it was held that one of the partners who had retired from the firm after giving notice to the other was not at liberty to continue in the trade at all (*l*).

Award disposing of business.—Again, where on the retirement of a partner, it was left to an arbitrator to determine what the continuing partner should pay for the good-will, and the arbitrator fixed a sum upon the understanding that the retiring partner would not commence a new business in the same street in which the old one was carried on: an injunction was granted restraining the retiring partner from carrying on business in that street, although the award itself was silent upon the point (*m*).

It follows from the foregoing observations that the good-will of a valuable partnership business may be practically unsalable and worthless, at least to any one except a former partner desiring to continue the business of the firm (*n*). It is only so far as good-will has a salable value that it can

be regarded as an asset of any partnership; and the [*443] good-will of *a business is frequently of no value at all, except in connection with the place of business (*o*). This, however, is by no means always the case. The value of the good-will of a newspaper, for example, attaches to its name, and is scarcely, if at all, dependent on the place of publication.

Good-will assets of the firm.—The salable value of the good-will of a partnership business, whatever that value may be, must be considered as belonging to the firm, unless there is some agreement to the contrary; and it follows from this —

1. That if a firm is dissolved, and there is no agreement to the contrary, the good-will must be sold for the benefit of all the partners, if any of them insist on such sale (*p*);
2. That, so far as is possible, having regard to the right of

(*l*) *Cooper v. Watson*, 3 Dougl. 413; *s. c. sub nomine Cooper v. Watlington*, 2 Chitty, 451. Compare *Davies v. Davies*, 36 Ch. D. 359, *ante*, p. 437, note (*o*).

(*m*) *Harrison v. Gardner*, 2 Madd. 198.

(*n*) See *Davies v. Hodgson*, 25

Beav. 177, where the good-will was treated as valueless on this very ground.

(*o*) As in *Blake v. Shaw*, Johns. 732. See *ante*, p. 439, note (*c*).

(*p*) *Pawsey v. Armstrong*, 18 Ch. D. 698; *Bradbury v. Dickens*, 27 Beav. 53, and the cases cited *infra*.

every partner to carry on business himself, the Court will, on a dissolution, interfere to protect and preserve the good-will until it can be sold (*q*);

3. That if a partner has himself obtained the benefit of the good-will, he can be compelled to account for its value, *i.e.*, for what it would have sold for, he being himself at liberty to compete in business with the purchaser (*r*).

Good-will in cases of death.—In the event of dissolution by death, it has been said that the good-will survives, and there is a clear decision to this effect (*s*). But this is not in accordance with modern authorities; they are wholly opposed to the notion that the value of the good-will, as such, belongs to the survivor (*t*). It undoubtedly may happen that the survivor may obtain the benefit of the good-will without paying for it; for he is at liberty (* unless re- [*444] strained by agreement) to carry on business on his own account (*u*), and possibly in the old place of business and in the name of the late firm (*x*). Under these circumstances, if, on the death of a partner, the good-will is put up for sale, it will produce nothing if it is known that the surviving partner will exercise his rights. He will therefore acquire all the benefit of the good-will; but he does not acquire it by survivorship, as something belonging to him exclusively, and with which the executors of the deceased partner have no concern; for if he did, he might sell the good-will for his own benefit, and this he cannot do (*y*). When, therefore, it is said that on the death of one partner the good-will of the firm survives to the other, what is meant is, that the survivor is entitled to all the advantages incidental

(*q*) See *Turner v. Major*, 3 Giff. 442, where, however, there was an express agreement for the sale of the good-will. In *Lewis v. Langdon*, 7 Sim. 425, the V.-C. Shadwell seemed to think that a surviving partner was under no obligation to preserve the good-will. But his opinion was probably influenced by *Hammond v. Douglas*, 5 Ves. 539, which was not then overruled.

(*r*) *Smith v. Everett*, 27 Beav. 446; *Mellersh v. Keen*, ib. 236, and 28 Beav. 453.

(*s*) *Hammond v. Douglas*, 5 Ves. 539.

(*t*) *Wedderburn v. Wedderburn*, 22 Beav. 104; *Smith v. Everett*, 27 Beav. 446, and *Mellersh v. Keen*, ib. 236, and 28 Beav. 453. See, also, *Gibblett v. Read*, 9 Mod. 459, a case of a newspaper.

(*u*) *Farr v. Pearce*, 3 Madd. 74; *Davies v. Hodgson*, 25 Beav. 177.

(*x*) See, as to this, *infra*, note (*e*).

(*y*) See *Smith v. Everett*, 27 Beav. 446; *Mellersh v. Keen*, ib. 236, and 28 ib. 453; *Wedderburn v. Wedderburn*, 22 Beav. 104. See, however, *Farr v. Pearce*, 3 Madd. 74, and *Hammond v. Douglas*, 5 Ves. 539, *contra*. The last case cannot be regarded as now law.

to his former connection with the firm, and that he is under no obligation, in order to render those advantages salable, to retire from business himself (z).

Good-will in case of retirement of one partner.—Again, when a partner retires not only from the firm, but from the business carried on by it, the continuing partners will acquire the benefit arising out of the good-will for nothing, unless it has been agreed that they shall pay for it; for they retain possession of the old place of business, and they continue to carry on that business under the old name. This, in fact, secures the good-will to them, and they cannot be compelled to pay separately for it, unless some agreement to that effect has been entered into (a).

Good-will in connection with use of name.—The right to continue the use of a partnership name is frequently the most important element in the good-will, and is governed by principles similar to those applicable to it.¹ The [*445] * purchaser of the good-will of a business acquires the right not only to represent himself as the successor of those who formerly carried it on (b), but also to use the old name (c) and to prevent other persons from doing the like (d). If then the good-will of a partnership business has any salable value at all, it seems impossible to hold that on a dissolution of a partnership, whether by death or otherwise, any partner can continue the old business in the old name for his own benefit, unless there is some agreement to that effect, or at least to the effect that the assets are not to be sold. Such a right on his part is inconsistent with the right of the other partners to have the good-will sold for the common benefit of all. There are, however, authorities tending to show that, in the case of death, the surviving partners are entitled to continue to carry on business in the

(z) See *Farr v. Pearce*, 3 Madd. 74; *Davies v. Hodgson*, 25 Beav. 177; *Mellersh v. Keen*, 27 Beav. 236, and 28 ib. 453.

(a) See *infra*. An agreement to pay out a retiring partner the value of his share, as shown by the last annual account, does not entitle him

to have the good-will valued, *Steuart v. Gladstone*, 10 Ch. D. 626. Compare *Wade v. Jenkins*, 2 Giff. 509, *infra*, p. 448.

(b) *Churton v. Douglas*, Johns. 174, *ante*, p. 441.

(c) *Levy v. Walker*, 10 Ch. D. 436.

(d) See the two last notes.

¹ *Morgan v. Schnyler*, 79 N. Y. 490; s. c. 35 Am. Rep. 543 and note; *Iowa Seed Co. v. Dorr*, 70 Iowa, 481; s. c. 59 Am. Rep. 446; *Glen & Hall Mfg. Co. v. Hall*, 61 N. Y. 226; s. c. 19 Am. Rep. 278; *Aikins v. Piper*, 15 Ont. Chy. 581; *Boyd v. Boyd*, 29 Low. Can. J. 170.

old name (*e*), and to restrain the executors of the deceased partner from doing the like (*f*). But if these cases are carefully examined, they will be found scarcely to warrant so general a proposition. In *Webster v. Webster* (*g*), the executors of a deceased partner sought to restrain the surviving partners from carrying on business in the name of the old firm; but the application was based upon the untenable ground that by so doing the surviving partners exposed the estate of the deceased partner to continued liability. No question of good-will appears to have been in dispute. In *Lewis v. Langdon* (*h*), the V.-C. Shadwell certainly intimated his opinion to be, that surviving partners had a right to continue to carry on business in the old name (*i*); but the real question there was, whether the executors of a deceased partner were entitled to continue the use of that name; and it was held that they were not, which is quite consistent with the absence of the same right on the part of the surviving partner. There seems, moreover, to have been some *agreement not set out in the report (*k*), which in- [*446]fluenced the judge's decision; and at the time it was pronounced the doctrine that good-will is, if salable, a partnership asset, was not so well established as it is at present.

Continued use of name only wrong on one of two grounds. —

In considering this question, the right of a late partner not to be exposed to risk by having his name continued in a business must not be forgotten (*l*); and where his name is part of the name of the firm, *e.g.*, if his name is A. B., and the name of the firm is A. B. & Co., so long as he lives he would, it is apprehended, in the absence of an agreement to the contrary, be entitled to restrain his late co-partners and their representatives from carrying on business under the old name, and so continually exposing him to risk. But a sale by him of his interest in the good-will includes the right to use the old name even if it is his own (*m*). The right of a late partner to prevent the continued use of his own name

(*e*) *Webster v. Webster*, 3 Swanst. 490; *Lewis v. Langdon*, 7 Sim. 421; *Robertson v. Quiddington*, 28 Beav. 536; *Banks v. Gibson*, 34 Beav. 566.

(*f*) *Lewis v. Langdon*, 7 Sim. 421.

(*g*) 3 Swanst. 490.

(*h*) 7 Sim. 421.

(*i*) See, too, *per* Lord Romilly, in 28 Beav. 536.

(*k*) See the last line in 7 Sim. 425.

(*l*) See *Routh v. Webster*, 10 Beav. 561; *Bullock v. Chapman*, 2 De G. & Sm. 211; *Troughton v. Hunter*, 18 Beav. 470. See, also, *Hodges v. London Trams Omnibus Co.*, 12 Q. B. D. 105.

(*m*) *Levy v. Walker*, 10 Ch. D. 436; *Banks v. Gibson*, 34 Beav. 566.

on the ground of exposing him to risk is a purely personal right, and does not devolve either on his executors or on his trustee in bankruptcy, for they would not be exposed to risk. Their right, and indeed the right of any partner whose name does not appear in the name of the firm, to prevent the continuance of the use of the name of the firm, can only be maintained upon the ground that such right is involved in the more general right of having the partnership assets, including the good-will, sold for the common benefit. And if upon a dissolution this right is waived, or if the terms of dissolution are such as to preclude its exercise, then each partner cannot only carry on business in competition with the others, but each can represent himself as late of, or as successor to, the old firm: and each may use the old name

without qualification (*u*); at all events if he does [*447] *not hold out the other partners as still in partnership with himself (*o*).

Good-will in connection with trade marks.—The use of a partnership trade mark is another very important element in the good-will of its business. A partnership trade mark is an asset of the firm, salable on a dissolution like any other asset (*p*). The partnership name may be a trade mark (*q*).

Valuation of good-will.—Good-will is generally valued at so many years' purchase on the amount of profits.

Agreements as to paying for good-will on retirement, &c.—In framing articles of partnership, too great care cannot be taken to express as clearly as possible what is intended to be done with respect to good-will; and in order to avoid all ambiguity, the word itself should be made use of. There are cases which show that an agreement to take a retiring partner's share in the property and effects of the partnership (*r*), or in the partnership premises (*s*), do not entitle

Note in the first of these, Miss Charbonnel having married and changed her name, was not in fact held out as a partner.

(*u*) See *Banks v. Gibson*, 34 Beav. 566, and the cases cited in the last four notes. See, as to describing oneself as late with or from another, *Glenny v. Smith*, 2 Dr. & Sm. 476.

(*o*) Even this qualification is doubtful. See *Levy v. Walder*, 10 Ch. D. 436.

(*p*) See *Bury v. Bedford*, 4 De G.

J. & Sm. 352; *Hall v. Barrows*, 4 De G. J. & Sm. 150. Trade marks registered under 46 & 47 Vict. c. 57, § 70, are only assignable with the good-will of the business, see *Wellcome's Trade mark*, 32 Ch. D. 213.

(*q*) 46 & 47 Vict. c. 57, § 64. See *ante*, book i. ch. 6, § 2.

(*r*) See *Hall v. Hall*, 20 Beav. 139; *Kennedy v. Lee*, 3 Mer. 452.

(*s*) *Burfield v. Rouch*, 31 Beav. 241. Compare *Blake v. Shaw*, Johns. 732.

him to anything in respect of good-will. But in another case a clause authorising a surviving partner to take the stock of the partnership at a valuation was held to entitle the executors of a deceased partner to a share of the value of the good-will of the partnership, and of a trade mark belonging to it (*t*).

When an agreement is entered into, to the effect that a retiring partner shall be entitled to be paid for his interest in the good-will of the firm, it is material to determine whether the firm is to be regarded as of definite or indefinite duration. For upon this will depend the amount to be paid to the retiring partner.

In *Austen v. Boys* (*u*), a partnership was entered into for seven years, with power for any partner to retire. In case of *retirement the retiring partner was to be [*448] paid by the continuing partners the fair market value of his interest and share in the partnership business, and in the good-will thereof. Two days before the expiration of the seven years, one of the partners retired, and the question arose, whether in ascertaining the value of his interest in the good-will of the business, the partnership business was to be considered as continuing, or as ending at the expiration of the seven years. It was held that the good-will to be valued, was the good-will of a business ending with the seven years, and that therefore the retiring partner's interest in it was nominal merely.

In *Wade v. Jenkins* (*x*), partnership articles stipulated that the good-will should be deemed to be of the value of 6000*l.* and should belong to the partners in the proportions in which they were entitled to the capital, but that the value of the good-will should not be taken into account in any of the accounts between the partners. On the death of one of the partners it was held that he was entitled to a share of the good-will; and that the last-mentioned stipulation only applied to the accounts taken during the continuance of the partnership.

In *Turner v. Major* (*y*), partners agreed to dissolve and to

(*t*) *Hall v. Barrows*, 4 De G. J. & Sm. 150.

(*u*) 24 Beav. 598, affirmed 2 De G. & J. 626.

(*x*) 2 Giff. 509. Compare *Steuart v. Gladstone*, 10 Ch. D. 626, where there was no clause specially applicable to good-will.

(*y*) 3 Giff. 442.

have the assets and good-will sold by two persons selected by them: an injunction was granted to restrain one of the partners from violating this agreement, by carrying on business on his own account before the good-will of the partnership had been disposed of.

19. **Getting in debts on dissolution.**—When a firm is dissolved, it is usual to appoint one of the partners, or some third person, to collect and get in the debts of the firm. But notwithstanding any such arrangement and notice thereof, a debtor to the firm will be discharged if he pays to any one of the partners (*z*). Effect, however, will be given by the Court to an agreement of the nature in question, by appointing a receiver, and, if necessary, granting an injunction (*a*). If the agreement is under seal and is [*449] broken, an action for damages may be *brought upon it (*b*). But it has been held that an agreement not under seal entered into between two members of a dissolved partnership, to the effect that one of them shall get in the debts of the firm, and pay what he shall receive in respect thereof to his co-partner, is not an agreement on which the latter can maintain any action for damages in case the debts are got in, and the money received on account of them is not paid over; for it is said there is no consideration for such an agreement (*c*). But it seems to have been admitted, in the case in which this was decided, that if the partner to whom the money when received is to be paid agrees that he will take no steps to collect the debts himself, that will be a sufficient consideration to support the promise to pay.

Getting in debts when one firm succeeds another.—When a partner retires, on the terms that the continuing partners are to get in the old debts, and that such debts, when got in, are to be taken into account in ascertaining the share of the retiring partner, the latter will have a right to charge the continuing partners with whatever debts they may choose to take to themselves and not get in. As observed by Lord Romilly: “If continuing partners who are bound to get in

(*z*) *Ante*, p. 134.

(*a*) *Davis v. Amer*, 3 Drew. 64.

(*b*) As in *Belcher v. Sikes*, 8 B. & C. 185.

(*c*) See *Lewis v. Edwards*, 7 M. & W. 300, where such an agreement was come to between a solvent partner and the assignees of a bankrupt partner.

debts belonging to an old firm, think fit to enter into a new agreement with the debtors of the old firm, by which those debtors become the debtors of the new firm, and the debts of the old firm become merged in that of the new firm by a security taken for the aggregate debt, such continuing partners are liable to the retiring partners for the amount of the old debt as one of the assets received by them" (*d*).

20. **Assignment of shares, &c., by retiring partner.**—When a partner retires or dies, and he or his executors are paid what is due in respect of his share, it is customary for him or them formally to assign and release his interest in the partnership, and for the continuing or surviving partners to take upon themselves the payment of the outstanding debts of the firm, and to indemnify their late partner or his estate, from all such debts.¹

* **Assignment of debts.**—An assignment of all the [*450] partnership stock, debts, sums of money, and all other the personal estate and effects of the assignors as partners, did not before the Judicature acts give the assignees a right to sue one of the assignors for a debt due from him to the partnership (*e*). But if one of the assignors after the execution of the deed releases a debt which has been assigned, or negotiates a bill held by the firm, he becomes liable to an action, for he has no right to derogate from his own grant (*f*).

Stamp on assignment by outgoing partner.—An assignment

(*d*) *Lees v. Laforest*, 14 Beav. 262.

(*f*) *Aulton v. Atkins*, 18 C. B.

(*e*) See *Aulton v. Atkins*, 18 C. B. 249.

¹ Where articles provide that on death of partner, his capital shall be left in the business until end of the term, his executor need not engage in the business, and if he does not choose to do so, he incurs no liability by leaving the testator's capital in the business. *Wild v. Davenport*, 48 N. J. 129; s. c. 7 Atl. Rep. 295.

If, however, the executor exercises his option to come in, he assumes all the rights and liabilities of a partner.

A stipulation in partnership articles that, upon the death of a partner, his capital shall remain in the business until the expiration of the prescribed term, is binding upon the estate of the deceased partner as well as upon the surviving partner. *Scholefield v. Eichelberger*, 7 Pet. 586; *Burwell v. Mandeville*, 2 How. 560; *Downs v. Collins*, 6 Hare, 418; *Wild v. Davenport*, 48 N. J. 129; s. c. 7 Atl. Rep. 295; *Edgar v. Cook*, 4 Ala. 588; *Egberts v. Wood*, 3 Paige, 517.

A provision that upon the death of either partner the property shall vest in the survivor, and that he shall become indebted to the deceased partner's representative for its value, is valid. *Gant v. Reed*, 24 Tex. 46.

by a partner of his share and interest in the firm to his co-partners, in consideration of the payment by them of what is due to him from the firm, is regarded as a *sale* of property within the meaning of the Stamp acts: and consequently the deed of assignment requires an *ad valorem* stamp (*g*). But if the retiring partner, instead of assigning his interest, takes the amount due to him from the firm, gives a receipt for the money, and acknowledges that he has no more claims on his co-partners, they will practically obtain all they want: but such a transaction, even if carried out by deed, could hardly be held to amount to a sale; and no *ad valorem* stamp it is apprehended would be payable (*h*).

21. **Indemnity to outgoing partner.**—An indemnity is ordinarily given by a bond or covenant entered into by the continuing or surviving partners, in consideration of the assignment to them of all the share and interest of the retiring or deceased partner. The bond or covenant should be joint and several (*i*). The effect of such a bond or covenant is to render a retiring partner, as between himself and his late co-partners, a surety only for the payment of the [*451] partnership debts (*k*): *and to render him their specialty creditor if, notwithstanding their indemnity, he is compelled to pay those debts (*l*).

Right to indemnity.—It is to be observed, that in the absence of any agreement to that effect, a retiring partner or the executor of a deceased partner has no right to an indemnity from the other partners, except so far as he may be entitled to have the assets of the firm applied in payment of its debts, and to enforce contribution in case he has to pay more than his share of those debts. But if all the assets of the firm are assigned to the continuing or the surviving partners, it is only fair that they should undertake to pay its debts: and if it appears that it was the intention of all

(*g*) *Christie v. Commissioners of Inland Revenue*, L. R. 2 Ex. 46; *Phillips v. Same*, ib. 399; *Potter v. The Commissioners of Inland Revenue*, 10 Ex. 147. These cases over-rule *Belcher v. Sikes*, 6 B. & C. 234.

(*h*) In *Steer v. Crowley*, 14 C. B. N. S. 337, a release by the executors of a deceased partner did not state the consideration, and bore only a common deed stamp; and it was

held that the deed was a good document of title, although some penalty might be payable by the parties to it, or by their solicitors, for not stating the consideration.

(*i*) See, as to this, *ante*, p. 196.

(*k*) *Rodgers v. Maw*, 4 Dowl. & L. 66; *Oakeley v. Pasheller*, 4 Cl. & Fin. 207, *ante*, p. 251.

(*l*) *Musson v. May*, 3 V. & B. 194.

parties that they should do so, effect will be given to such intention, although the undertaking on their part is not explicit in its terms (*m*).

Effect of express indemnity on lien.—When a retiring partner assigns his interest in the partnership assets, and obtains from the continuing partners a covenant of indemnity, his lien on the partnership assets seems to be at an end. In *Re Langmead's trusts* (*n*) the assignment was made expressly subject to the payment of the retiring partner's share of the partnership debts. The continuing partner became bankrupt; and the retiring partner's executors were compelled to pay the unsatisfied partnership debts. It was nevertheless held that they had no lien on the specific assets of the old firm, but were confined to their remedy on the covenant for indemnity.

22. Arbitration clauses.—With respect to these, it is to be observed: ¹—

1. That an agreement to refer to arbitration is one which a court will not decree to be specifically performed (*o*); and

2. That it is one which (independently of the Common law procedure act of 1854) cannot be effectually set up as a defence to any action relative to a matter agreed to be *referred (*p*); unless, indeed, the reference has [*452] been expressly made a condition precedent to the right to sue (*q*). At the same time a Court will sometimes decline to interfere between partners who have agreed that their disputes should be referred to arbitration, and who have not attempted so to settle them (*r*).

(*m*) See *Saltoun v. Houstoun*, 1 Bing. 433.

(*n*) 7 De G. M. & G. 333. See, too, *Lingen v. Simpson*, 1 Sim. & Stu. 600. See *ante*, pp. 354, 355.

(*o*) *Agar v. Macklew*, 2 Sim. & Stu. 418; *Street v. Rigby*, 6 Ves. 818. An action will lie for not referring in pursuance of an agreement so to do, *Livingston v. Ralli*, 5 E. & B. 132. See, generally, *Fry*, Spec. Perf. ch. 8 (ed. 2).

(*p*) *Dawson v. Fitzgerald*, 1 Ex. D. 257; *Edwards v. Aberayron, &c.*, Soc., 1 Q. B. D. 563; *Cooke v. Cooke*,

4 Eq. 77; and the older cases referred to there.

(*q*) See *Scott v. Avery*, 5 H. L. C. 811; *Halfhide v. Fenning*, 2 Bro. C. C. 336. The last case is generally regarded as overruled, but *quare* whether it is not capable of being supported on the principle recognised in *Scott v. Avery*. See the observations of Lord St. Leonards in *Dimsdale v. Robertson*, 2 Jo. & Lat. 91, and of V.-C. Wood in *Cooke v. Cooke*, 4 Eq. 77.

(*r*) *Waters v. Taylor*, 15 Ves. 10.

¹ Agreement in articles to submit differences to arbitration will not preclude partner from bringing a bill for dissolution. *Page v. Marshall*, 6 Phila. (Penn.) 264.

17 & 18 Vict. c. 125, § 11. — By 17 & 18 Vict. c. 125, which contains several important provisions respecting agreements to refer to arbitration, it is amongst other things (by § 11) enacted that, —

“Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree (*s*) that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in *respect of matters so agreed to be referred*, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance, and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms, as to cost and otherwise, as to such court or judge may seem fit: Provided always that any such rule or order may at any time afterwards be discharged or varied as justice may require.”

The section does not apply where a submission to refer has been revoked before action (*t*).

[*453] * The Court will decide whether the matters in dispute are or are not within the arbitration clause (*u*). But even if they are, the section is not imperative; and the Court in the exercise of its discretion has declined to interfere where there were several matters in dispute, some only of which were within the agreement to refer (*v*); where one of the parties had become bankrupt (*x*); where there was a *bonâ fide* suggestion of fraud (*y*); where there was really

(*s*) In *Blyth v. Lafone*, 1 E. & E. 435, it was held that the agreement to refer must be contained in the instrument on which the dispute arises. But this has been overruled. See *Randell, Saunders, and Co. v. Thompson*, 1 Q. B. D. 748, and *Mason v. Haddan*, 6 C. B. N. S. 525.

(*t*) *Randell, Saunders, and Co. v. Thompson*, 1 Q. B. D. 748. See, also,

Deutsche Springstoff Actien Gesellschaft v. Briscoe, 20 Q. B. D. 177.

(*u*) See *Piercy v. Young*, 14 Ch. D. 200.

(*v*) *Wheatley v. Westminster, &c., Coal Co.*, 2 Dr. & Sm. 347.

(*x*) *Pennell v. Walker*, 18 C. B. 651.

(*y*) *Wallis v. Hirsch*, 1 C. B. N. S. 316. Compare *Russell v. Russell*, 14

no question in dispute, and the defendant's only object was delay (*z*); where the object was to stop a suit, and not really to settle a dispute, which the defendant desired to refer before the suit was commenced (*a*).

Where, however, there is a *bonâ fide* dispute within the meaning of an agreement to refer, and there is no satisfactory reason why such dispute should not be settled by arbitration, legal proceedings will be stayed (*b*); even although the agreement to refer is contained in articles of partnership for a term of years which has expired (*c*).

In one case the Court refused to interfere where the plaintiff sought to have a partnership dissolved, and to have a receiver appointed, on the ground of the defendant's misconduct (*d*); but this case has not been followed (*e*); nor is there any reason why the Court should not appoint a receiver, if necessary, pending the arbitration (*f*).

* **Power of arbitrator.** — Under a general submission [*454] by partners of all matters in difference between them, an arbitrator may dissolve the partnership (*g*); and may order one partner to pay or give security for the payment of a certain sum to the other (*h*); and apportion the assets between them (*i*); and order conveyances to be made (*k*); and direct one partner to sue in the name of himself and others, and give them a bond of indemnity (*l*); and restrain one partner from carrying on business within certain lim-

Ch. D. 471, where the party complaining of fraud resisted arbitration.

(*z*) *Lury v. Pearson*, 1 C. B. N. S. 639. The true grounds of this decision appear to have been those stated above, but the report is obscure.

(*a*) *Corcoran v. Witt*, 8 Ch. 476 n., explained in 16 Eq. 571.

(*b*) As in *Russell v. Russell*, 14 Ch. D. 471, where notice to dissolve had been given; *Law v. Garrett*, 8 Ch. D. 26, where the agreement was to refer to a foreign tribunal; *Plews v. Baker*, 16 Eq. 564; *Willesford v. Watson*, 8 Ch. 473, and 14 Eq. 572; *Randegger v. Holmes*, L. R. 1 C. P. 679; *Seligmann v. Le Boutillier*, ib. 681; *Russell v. Pellegrini*, 6 E. & B. 1020; *Hirsch v. Im Thurn*, 4 C. B. N. S. 569.

(*c*) *Gillett v. Thornton*, 19 Eq. 599.

(*d*) *Cook v. Catchpole*, 10 Jur. N. S. 1068.

(*e*) *Plews v. Baker*, 16 Eq. 564; *Gillett v. Thornton*, 19 Eq. 599.

(*f*) See as to this, *infra*, note (*o*).

(*g*) *Green v. Waring*, 1 W. Blacks. 475; *Hutchinson v. Whitfield*, *Hayes*, Ir. Ex. 78. *Simmonds v. Swaine*, 1 Taunt. 549, shows that a dissolution need not be awarded.

(*h*) *Simmonds v. Swaine*, 1 Taunt. 549.

(*i*) *Lingood v. Eade*, 2 Atk. 505; *Wood v. Wilson*, 2 Cr. M. & R. 241; *Wilkinson v. Page*, 1 Ha. 276.

(*k*) *Wood v. Wilson*, 2 Cr. M. & R. 241.

(*l*) *Burton v. Wigley*, 1 Bing. N. C. 665; and see *Goddard v. Mansfield*, 19 L. J. Q. B. 305; *Philips v. Knightley*, 2 Str. 903.

its (*m*); and direct mutual releases to be executed (*n*). It seems, however, that the arbitrator cannot appoint a receiver to collect and get in the partnership assets and credits (*o*); nor direct one of the partners to pay money to him (the arbitrator) in order that he may apply it in payment of certain specified debts (*p*). It has also been held that an arbitrator cannot enter into the question whether any part of a premium paid on entering into the partnership shall be refunded, unless the submission pointedly raises that question for determination (*q*).

23. **Penalties and liquidated damages.**—The last clause in a partnership deed is often one by which each partner binds himself to pay, either by way of penalty or by way of liquidated damages, a certain sum in case of the infringement by him of any agreement contained in the previous clauses. A stipulation that on the breach of any agreement in [*455] the articles, a sum *shall be paid by way of penalty is of little real use, and is sometimes worse than useless, for the sum mentioned will not be payable unless damage to its amount can be proved (*r*); and on the other hand the penalty generally limits the compensation which can be obtained, even although damage to a greater extent has been sustained (*s*). Moreover, if there are several covenants, and if for any breach, however trivial, of any of them involving the payment of a small sum of money, it is stipulated that a large sum shall be paid by way of liquidated damages, the stipulation is always construed as a stipulation for payment of the larger sum by way of penalty (*t*). An agreement to pay a definite sum as liquidated damages in certain specified events, *e.g.*, on carrying on business within prescribed limits, may no doubt prove useful (*u*); but even in these cases care

(*m*) *Morley v. Newman*, 5 D. & R. 317. In *Burton v. Wigley*, 1 Bing. N. C. 665, the award permitted a partner to carry on business, although the articles provided for his not doing so.

(*n*) *Lingood v. Eade*, 2 Atk. 505, where the arbitrator directed such releases to be settled by a Master in Chancery.

(*o*) *Lingood v. Eade*, 2 Atk. 505; *Re Mackay*, 2 A. & E. 356. But a receiver was appointed in *Routh v. Peach*, 2 Anstr. 519, and 3 ib. 637.

(*p*) *Re Mackay*, 2 A. & E. 356.

(*q*) See *Tattersall v. Groote*, 2 Bos. & P. 131.

(*r*) See the note to *Gainsford v. Griffith*, 1 Wms. Saund. 57.

(*s*) See *Clarke v. Ld. Abingdon*, 17 Ves. 106.

(*t*) See *Wallis v. Smith*, 21 Ch. D. 243, where all the older cases are reviewed. See, also, *Elphinstone v. Monkland Iron and Coal Co.*, 11 App. Ca. 332.

(*u*) *Atkyns v. Kinnier*, 4 Ex. 776; *Reynolds v. Bridge*, 6 E. & B. 528,

must be taken not to make the contract alternative; for if it is and the stipulated sum is paid, a court will not interfere by injunction (*x*). The mere existence of an agreement for liquidated damages does not, however, necessarily make a contract alternative, and preclude such interference (*y*).

may be referred to as examples. See, too, *The East India Co. v. Blake*, Finch, 117, where it was held that though a court of equity would relieve against a penalty, it would not relieve against payment of liquidated damages.

(*x*) *Sainter v. Ferguson*, 1 Mac. & G. 286; *Woodward v. Gyles*, 2 Vern. 119.

(*y*) *French v. Macale*, 2 Dr. & War. 269; *Coles v. Sims*, 5 De G. M. & G. 1; and see *Avery v. Langford*, Kay, 663; *Clarkson v. Edge*, 33 Beav. 227.

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